REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: SS 154/2009

DATE: 25/11/2010

In the matter between:

THE STATE

and

NORBERT GLENN AGLIOTTI Accused

J U D G M E N T

KGOMO, J:

[1] At the close of the State case hereinafter a long and/or protracted hearing, the accused herein is applying for his discharge in terms of section 174 of the Criminal Procedure Act, 1977 (Act 51 of 1977), as amended (the Criminal Procedure Act).

[2] The basis of the application is:

2.1 that the accused did not receive a fair trial in that the prosecution, while in possession of statements and other evidential material, failed or neglected or refused to act in accordance with their duty or legal obligation to make same available to the court and/or the defence, as well as manipulated or attempted to manipulate the witnesses' evidence so as to ensure that they testified in chief about matters that were not covered by their statements, more particularly, those statements that the witnesses made in terms of section 204 of the Criminal Procedure Act, thereby rendering the whole process unconstitutional and the trial unfair; and/or

2.2 that the State has not made out a *prima facie* case against the accused at the close of its case and that, to put the accused on his defence when there is no evidence on record upon which a person, acting carefully, can convict the accused, would be tantamount to making or causing him to make a case against himself where none existed before.

[3] Both the defence and the prosecution have submitted copious and comprehensive heads of argument and I am indebted to them for the efforts they put in to compile same. Counsels on both sides, Adv L Hodes SC on behalf of the defence and Adv Dakana on behalf of the prosecution also argued and submitted *viva voce* for and against the granting of the

application, accentuating points in their heads they reckoned were important or in addition to the points mentioned in the heads.

[4] The prosecution team consisted of Adv Dakana, duly assisted by Advocates Gcaleka and Mashiane from the Gauteng Director of Public Prosecution's Office (DPP) in Johannesburg and the defence was handled by Adv L Hodes SC duly assisted only at the arguments stage by Adv Mokotedi.

[5] The indictment herein sets out the following four (4) charges against the accused:

5.1 Count 1 – Contravention of section 18(2)(a) of the Riotous Assemblies Act, 1956 (Act 17 of 1956) as amended (the Riotous Assemblies Act) namely, conspiracy to murder Mark Bristow, Jean Daniel Nortier, Mark Wellesley-Woods and Stephen Mildenhall; the allegations being that during or about July to August 2005 and at or near Rondebosch in the district of Cape Town as well as at Illovo and Inanda in the district of Johannesburg and/or at places unknown to the prosecution, the accused conspired with Roger Brett Kebble, Clinton Ronald Nassif, Michael Donovan Schultz, Nigel Mc Gurg Faizel Smith and certain other persons whose particulars are unknown to the State, to aid or procure the murders of the said Mark Bristow, Jean Daniel Nortier, Mark Wellesley-Woods and Stephen Mildenhall;

5.2 Count 2 – Attempted murder of Stephen Mildenhall, the allegations being that upon or about 31 August 2005 and at or near Claremont in the district of Cape Town, the accused did unlawfully and intentionally attempt to kill Stephen Mildenhall by shooting him with a firearm(s);

5.3 Count 3 – Contravention of section 18(2)(a) of the Riotous Assemblies Act, No. 17 of 1956 – conspiracy to murder Roger Brett Kebble; the allegations being that during the period August to September 2005 and at or near Illovo and Inanda, in the district of Johannesburg and/or at places unknown to the State or Prosecution, the accused conspired with the said Roger Brett Kebble, Clinton Ronald Nassif, Michael Donovan Schultz, Nigel Mc Gurg, Faizel Smith and certain other persons, whose further particulars are unknown to the State, to aid or procure the murder of Roger Brett Kebble; and

5.4 Count 4 – Murder of Roger Brett Kebble – the allegations being that upon or about 27 September 2005 and at or near Birdhaven in the district of Johannesburg, the accused did unlawfully and intentionally kill the said Roger Brett Kebble.

[6] The Prosecution had duly sought and was granted leave to prosecute even charges that occurred outside the jurisdiction of this Court together with those that were committed within the court's jurisdiction.

[7] Accused pleaded not guilty to all the charges on 26 July 2010 and put the State to the proof of all the allegations. He further recorded that his version would appear from his counsel's cross-examination of the state witnesses.

[8] The accused also made formal admissions in terms of section 220 of the Criminal Procedure Act relating to the identity of the deceased, his date, place and causes of death, the results of the *post mortem* examination on the deceased's body as well as the relevant photos contained in a photo-album depicting the scene of crime and the *post mortem* examination. Various exhibits of photos depicting the various crime scenes as well as some of the state witnesses making some pointings out were also admitted as evidence by mutual agreement.

[9] In order for the evidence led herein to be understood in its correct context, it is necessary that I set out what the various descriptions of the prohibitions or crimes are as well as what the requirements of each crime is:

9.1 Conspiracy

Section 18(2)(a) of the Riotous Assemblies Act describes conspiracy to commit a crime as follows:

> "*18(2)(a) Any person who … conspires with any other person to aid or procure the commission of or to commit … any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.*"

9.2 This section does not differentiate between a successful conspiracy (that is, one followed by the actual commission of the offence) and one not followed by any further steps towards the commission of the crime. Our courts have held that this provision ought to be utilised only if the envisaged crime has not yet been committed.

See: *S v Milne and Erleigh (7)* 1951 (1) SA 791 (A) at 823.

S v Njenje 1966 (1) SA 369 (RA) at 376-377.

S v Khoza 1973 (4) SA 23 (O) at 25.

9.3 On the other hand, there is no absolute prohibition on the State to charge somebody with conspiracy even when the main crime has in fact been committed. It would of course be wrong to

convict a person of both the conspiracy and the main crime since the two in fact merge, just like where a successful attempt to commit a crime merges with the completed crime.

See: *S v Basson* 2001 (1) SACR 1 (T).

9.4 The requirements for this crime are, <u>The Act, Intention, More than one party and Punishment</u>.

9.4.1 <u>The Act</u>

There should be at least two people for the crime of conspiracy to be committed.

See: *S v Sibiya* 1993 (1) SACR 235 (A) at 249e.
S v S 1959 (1) SA 680 (C) at 683.
S v Cooper 1976 (2) SA 875 (T) at 879.

9.4.2 Before there can be a conspiracy, X and Y or more people must agree with one another to commit a crime. The act thus consists of the entering into an agreement which is often expressed by the statement –

"*… there must be a meeting of minds …*"

See: *S v B* 1956 (3) SA 363 (E) at 365.

S v Moumbaris 1974 (1) SA 681 (T) at 687.

9.4.3 The conspiracy need not be express : it may be tacit. In the last instance there will be a conspiracy only if other party(ies) agree to the scheme.

9.4.4 A court may infer a conspiracy from a person's conduct, provided that the inference is the only reasonable one to be drawn from the proven facts.

See: *S v Khoza* (*supra*).

S v Heyne 1958 (1) SA 607 (W) at 609.

S v Cooper and *S v B* (*supra*).

9.4.5 The conspirators need not agree about the exact manner in which the crime or crimes is to be committed.

See: *S v Adams* 1959 (1) SA 646 (Sp Court).

S v Cooper (*supra*) at 879H.

9.5 <u>Intention</u>

A co-conspirator must have the intention to conspire with another. He/she must intend to commit that crime or to assist in

its commission. A conspiracy may only be construed once a court is satisfied that a conspirator was also aware of his/her co-conspirators' knowledge of the conspiracy. Only then will there be talk of "*… a meeting of minds*".

9.6 More than one party

As stated above there must be at least more than one person for a conspiracy to be formed. One person cannot conspire with himself/herself to commit a crime. Equally, it is also accepted that there can be no conspiracy between a company consisting of a single person and that single person controlling it.

See: *Mc Donnel* [1966] 1 QB 233 All ER 193 (as discussed by Beuthin 1966 SALJ 224-226).

9.7 Punishment

A conspirator is liable to the same punishment as the person convicted of committing the crime itself. Normally, if a crime has a minimum prescribed sentence, the court may not be obliged to impose that minimum sentence for a conviction for conspiracy because a conspiracy mostly does not result in the same harmful consequences as the main offence. A lighter sentence than a prescribed minimum sentence may be imposed.

See: *S v Nel* 1987 (4) SA 950 (T) at 961D-E.

MURDER AND ATTEMPTED MURDER

[10]

10.1 Murder is the unlawful and intentional causing of the death of another human being. The elements thereof are – (a) causing the death; (b) of another person; (c) unlawfully; and (d) intentionally. Murder may be caused through an act or omission which causes that death.

10.2 Attempted murder is an attempt to do or commit the above. A person is guilty of attempting to commit a crime if, he/she intending to do so, unlawfully engages in conduct that is not merely preparatory but has also reached at least the commencement of the execution of the intended crime. A person is equally guilty of attempting to commit a crime even though the commission of the crime is impossible, if it would have been possible in the factual circumstances which he/she believes exist or will exist at the relevant time. A person will also be guilty of an attempt even when he/she voluntarily withdraws from its commission after his/her conduct has reached the commencement of the execution of the intended crime. The stage of commencement of execution is also called the stage of

consummation. Once this stage is reached, "*attempt*" as a crime is complete.

[11] In their opening address as well as in the indictment the prosecution alluded to the accused having taken part in an assisted suicide of the deceased herein. Although nothing further was said about this in the prosecution's heads of argument or their address in opposition of the application for the discharge of the accused in terms of section 174, it is my considered view that something needs to be said about it in this judgment, more so that the witness Clinton Nassif mentioned it during his testimony and it featured now an then during the evidence and/or cross-examination of other witnesses, notably, Minaar, the butler at Brett Kebble's house and Dominic Ntsele, Brett's image consultant.

[12] Assisted suicide has at times been confused with or equated to euthanasia. It is also generally accepted that euthanasia takes place within the medical or patient world where mostly a terminally ill patient either asks somebody, mostly a medical practitioner to help him/her out of his/her misery by administering to that patient a fatal dose of something or gives such patient medication or poisonous stuff for the latter to end his/her life. Euthanasia is also divided into active and passive euthanasia as well as voluntary and involuntary euthanasia.

[13] On the other hand, assisted suicide occurs when a person having emotional problems or stress requests another person to kill him by any means. Assisted suicide is described in other circles as a better test of the voluntariness of the choice to die or the patient's resolve to end his/her life.

[14] Whereas euthanasia is believed to be practised within the patient world, albeit not so openly or with clear-cut lawful and/or legal authority, assisted suicide is still a very fluid situation in South Africa as well as in other parts of the world where countries are still trying to grapple with what it is or whether it should be permitted or not.

[15] In Great Britain the British Suicide Act, 1961 decrees that aiding, abetting and assisting suicide is punishable with a maximum of 14 years imprisonment. In Canada, The Canadian Penal Code – section 241, decrees that everyone who counsels a person to commit suicide or who aids, or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence, the penalty being 14 years imprisonment. The strict interpretation of this Act was relaxed in June 1995 when the Canadian Special Senate Select Committee on Euthanasia and Assisted Suicides recommended that the laws relating to assisted suicide and euthanasia be re-visited. What happened in practice was that the attitude towards assisted suicide was not relaxed but in relation to euthanasia the Canadian Parliament cautioned that voluntary euthanasia may be allowed under very special circumstances but care must be taken that adequate safeguards are put in

place to ensure that the patient's consent is given and received freely and voluntarily if it is practised.

[16] In Australia, the Australian Criminal Code makes assisted suicide punishable. In terms of that Code it is also a crime for a doctor to put poison in the hands of a patient well knowing that the patient may ingest it and if so ingested it may cause death.

[17] In the Netherlands the current position is that section 293 of the Dutch Criminal Code makes it an offence for any person to assist or aid another to commit suicide. However a Commission has been set up to investigate the need to legalise it and if so, under what circumstances.

[18] In the United States of America, until November 1994, assisted suicide was outlawed in all the States. However, in November 1994 the voters of the State of Oregon voted narrowly (51% to 49%) to allow it. Subsequent or pursuant to that vote the Death with Dignity Act was passed in Oregon allowing terminally ill people to obtain a doctor's prescription for a fatal drug dosage to end their lives. The doctor however was not permitted to administer the dosage. If he/she did so, he/she was liable or culpable. This Act was challenged in the Federal District Court of Oregon the same year and its use was suspended pending a rule on its constitutionality. In 1995 the US Federal Court of Oregon State ruled this Act to be unconstitutional and a permanent injunction against its use granted. An appeal against this ruling to

the US Court of Appeals for the North Circuit was dismissed. As such, until further notice euthanasia and assisted suicide is still a crime in the USA.

[19] In South Africa the situation is still fluid and confusing. Different functionaries have differing views about euthanasia especially as well as assisted suicide. Civil society of times holds views opposed by the religious adherents who in turn are wont to differ *inter se*.

[20] Our courts have also in the past sent out inconsistent views in contradictory judgments about assisted suicide and euthanasia. When one traces the development of this phenomenon the confusion increases. The initial view was that a person who knowingly supplied any drugs to a patient for use in a suicide or who hands another a weapon to kill himself/herself was guilty of an offence. However, other courts gave verdicts that were inimical to the above view. For example –

20.1 In *R v Peveret* 1940 AD 213 the accused therein concluded a suicide pact with his mistress – a Mrs Saunders. They both sat inside a car whose doors and windows were closed. Peveret introduced the exhaust fumes of the car, whose engine was running, into the interior through a hosepipe. They were later discovered inside, unconscious. Fortunately they did not die. Peveret was found guilty of attempted murder of Mrs Saunders. His conviction was confirmed on appeal.

20.2 The opposite view was expressed in *R v Nbakwa* 1956 (2) SA 557 (SR) wherein a man living according to the old style customs and traditions of his tribe in Zimbabwe suspected his own mother of having caused the death of his child by occult means. When he confronted her his mother requested him to kill her. She was sickly. Nbakwa entered her hut where she lay, tied a rope to a rafter in the hut and also fashioned a noose at the rope's other end. He then told his mother to hang herself. She asked him to lift her up and give her something to stand on. He propped up a block of wood under the noose. His mother put the noose around her neck, kicked away the block of wood and started hanging until she died while Nbakwa stood there watching. Nbakwa was acquitted of murder in his eventual trial, the court finding that there was no chain of causation between Nbakwa's act and his mother's subsequent death. The court ruled that the mother killed herself. The court also refused to convict Nbakwa of attempted murder which was a competent verdict. Beadle J reasoned as follows:

> "*The accused did not actually kill the deceased himself, but if his acts could be construed as an attempt to do so … In my view the acts of the accused … do not go far enough to constitute an attempt; they go no further than what are commonly called acts of preparation. The accused provided a means for causing death and he persuaded the woman to kill herself, but the actual act which caused the death of the woman was the act of the woman herself. There was, to use a common legal expression, a novus actus interveniens between the actions of the accused and the death of the deceased … I come to the conclusion, therefore, that the accused's*

> *acts did not go far enough to constitute an attempt to murder; at most his acts went no further than acts of preparation.*"

20.3 The above *rationale* in *S v Mbakwa* was followed in *S v Gordon* 1962 (4) SA 727 (N). In this case, Gordon entered into a suicide pact with his girlfriend. He obtained or procured some lethal drug and they both ingested it. The girlfriend died but Gordon survived and lived. He was charged with murder. Henning J distinguished this case from *S v Peveret (supra)* as follows at p 730B-C:

> "*… it will be observed that in that* (Pevert's) *case the accused completed every necessary act to bring about the death of himself and Mrs Saunders, the starting of the engines being the final act. In the present case it is an accepted fact that the deceased took the tablets herself and that was the final act which brought about her death.*"

20.4 The learned Judge went further to state the following:

> "*To my mind, the mere fact that he provided the tablets knowing that the deceased would take them and would probably die cannot be said to constitute in law, the killing of the deceased. The cause of her death was her own voluntary act of swallowing the pills. The fact that he intended her to die is undisputable, but his own acts calculated to bring that result about fall short of a killing or an attempted killing by him of the deceased. One might say that the accused, as it were, provided the deceased with a loaded pistol to enable her to shoot herself. She took the pistol, aimed it at herself and pulled the trigger. It is not a case of qui facit per alium facit per se*."

20.5 Our own Appeal Court dealt with this aspect in *Ex parte Die Minister van Justisie: In re S v Grotjohn* 1970 (3) SA 355 (A). The court of appeal held among others that the views propounded in *S v Nbakwa* and *S v Gordon (supra)* were not to be regarded as unqualifiedly correct. Steyn CJ put it as follows:

> "*Of 'n persoon wat 'n ander aanmoedig, help of in staat stel om selfmoord te pleeg, 'n misdaad begaan, sal afhang van die feite van die besondere geval. Die blote feit dat die laaste handeling die selfmoordenaar se eie, vrywillige nie-misdadige handeling is, bring nie sonder meer mee dat bedoelde persoon aan geen misdaad skuldig kan wees nie. Na gelang van die feitlike omstandighede kan die misdaad moord, poging tot moord of strafbare manslag wees.*"

20.6 The above ruling was followed subsequently. In *S v Hibbert* 1979 (4) SA 717 (D) Mr Hibbert handed his depressed wife a firearm after she had expressed to him the desire to commit suicide. He was convicted of murder after his wife shot herself to death. Shearer J put it as follows at 722E-H:

> "*Now in the present case the accused set in motion a chain of events which ended in the deceased pressing the trigger of a fire-arm which she had been given by the accused and thus causing her death. The successive words and actions of the accused were designed to place her in possession of that fire-arm and were accompanied by the obvious hazard that the deceased might be persuaded to inflict upon herself an injury which could result in her death. The accused's conduct fell short only of the final act of pulling the trigger. It seems to me that the act of pulling the trigger to which all the other conduct*

> *conduced, cannot in any sense be described as independent of the course of conduct. That being so, we conclude that there was, in the proper sense of that expression, no actus novus interveniens which broke the chain of causation set in motion and continued by the series of acts of the accused which I have mentioned. The accused must, as we have found, have appreciated that injury and possibly death could result from his actions. That being so there is present the necessary intention to bring home a charge of murder. We find therefore that the accused occasioned the death of the deceased by his conduct; that he had the necessary intention and is therefore guilty as charged of murder.*"

20.7 The fluidity of the situation over assisted suicide and euthanasia in South Africa prompted the Government to instruct the South African Law Commission to make an in depth study of the situation and report back. The Law Commission has done so and submitted its recommendations.

20.8 As regards euthanasia it is also accepted that this is mostly restricted to terminally ill people. It most involves the withdrawal of medical treatment, care and/or the switching off of life sustaining contraptions in the field of medication to allow the suffering patient or infirm person to die in peace.

20.9 Those in favour of euthanasia, according to the Law Commission are of the view that it should be formalised in an Act of Parliament to legalise the cessation of treatment on a patient and/or assist a terminally ill person to die, subject to the following criteria:

20.9.1 The patient must be terminally ill;

20.9.2 The suffering must be subjectively unbearable;

20.9.3 The patient must consent to the cessation of treatment or administration of euthanasia; and

20.9.4 The situation precipitating the decision to euthanise or be euthanised must be certified by at least two medical practitioners.

See: Labuschagne JMT, *Dekriminalisasie van Eutenasie* 1988 THRHR 167 at 171-174.

20.10 Those against euthanasia, mostly religious formations as well as civil society, have varied views on euthanasia. According to the Christians they cherish the view that –

> "*… according to the Bible, God is the creator of life and therefore the only one who may give or take the life of a human being.*"

The Muslims opponents also share the same view, namely, that life and death are in the control of Allah. To quote the Noble Qur'an at 45:26 –

"*… Say (o Muhammad): It is Allah who gives you life, then causes you to die …*"

See: *Ebrahim AFM : The Noble Qur'an on the end of Human Life, al-'ilm* Vol. 16, 1996.

20.11 Civil society among others opposes it on the basis of the principle of the "*Sanctity of Life*". They argue among others that legalising euthanasia would require a complete change in the whole common law understanding of the prohibition of murder since the principle of the sanctity of life has always been the bulwark in every civilisation against the arbitrary destruction of the weak and the helpless. In the South African context this school of thought contend that there is a desperate need in our country to inculcate a reverence for life in our citizens, more so that our society is still struggling to recover from social engineering (read Apartheid) and that we should thus at all costs avoid falling into life and death engineering. They also hold the view that to legalise euthanasia would lead to the erosion of medical ethics as well as doctor-patient relationships. They further contend that public confidence in the medical profession will be undermined and the relationship between doctor and patient will be negatively affected. The medical practitioner will be set in the role of an executioner and it may open a way for unscrupulous doctors not worthy of the Hippocratic Oath to do

all in their powers to see to it that a patient in their care who is not responding to their treatment vanishes permanently, i.e. *dies*.

20.12 The general recommendation or finding of the SA Law Commission was that there is still a general prohibition of the intentional killing, be it called murder, euthanasia or assisted suicide. To quote from the SA Law Commission at 4.111 paragraph 237 –

> "*237. Ultimately, however, we do not believe that these arguments are sufficient reason to weaken society's prohibition of intentional killings. That prohibition is the cornerstone of law and social relationships. It protects each one of us impartially, embodying the belief that all are equal. We do not wish that protection to be diminished and therefore recommend that there should be no change in the law to permit euthanasia. We acknowledge that there are individual cases in which euthanasia may be seen by some to be appropriate. But individual cases cannot reasonably establish the foundation of a policy which would have such serious and widespread repercussions. Moreover, dying is not only a personal or individual affair. The death of a person affects the lives of others, often in ways and to an extent which cannot be foreseen. We believe that the issue of euthanasia is one in which the interest of the individual cannot be separated from the interest of society as a whole.*"

20.13 At paragraph 239 thereof the Commission continues as follows:

> "*239. We are also concerned that vulnerable people – the elderly, lonely, sick or distressed – will feel pressure, whether real or imagined, to request early death. We*

> *accept that, for the most part, a request resulting from such pressure or from remediable depressive illness would be identified as such by doctors and managed appropriately. Nevertheless, we believe that the message which society sends to vulnerable and disadvantaged people should not, however obliquely, encourage them to seek death, but should assure them of our care and support in life.*"

20.14 The advent of our constitutional era also came with divergent views although the Constitution itself recognises the right to life as inalienable. Some commentators and contributors to the debate on assisted suicide and euthanasia in the SA Law Commission, notably a Mr Fedler and the organisation(s) whose views, ideals and aspirations he represented at the Commission hearings sought to filter in their view that any legislation proposed or to be proposed, dealing with these topics, will therefore depend, <u>firstly</u>, on whether the courts give "*life*" a content value, importing some form of quality of life beyond mere existence; <u>secondly</u>, on whether the courts accept that there are circumstances in which a person's quality of life has degenerated to such an extent that to prolong the dying process runs counter to the right to life guarantee; and, <u>thirdly</u>, to what degree the other rights of a terminally ill person embodies the values of an open and democratic society which would justify a limitation of the right to life in circumstances where a person is little more than alive.

20.15 In *S v Makwanyana* 1995 (3) SA 391 (CC) Chaskalson J (then) held that public opinion may be of some relevance during the enquiry whether euthanasia was right or wrong but that in itself, is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour, because if public opinion were to be decisive, there would be no need for constitutional adjudication. The learned judge then went on to state or caution that the right to life is subject to the then section 33 of the Interim Constitution and that a limitation of this right may not necessarily amount to its extinction.

[21] The conclusion one arrives at at the end of it all is that in South Africa, a person assisting any other person to commit suicide, let alone actually kill the suicide requestor, will be guilty of an offence(s). Consequently, anyone who conspires with aids and/or abets another to commit suicide, albeit it be called assisted suicide, will also be guilty of an offence(s).

[22] It is in the context or vein of the above said that I now proceed to briefly examine the evidence of the state witnesses to determine whether the accused herein, Norbert Glenn Agliotti, is guilty as charged on any one or more of the four counts he is facing or whether any of the evidence led this far leadsd to any other direction or whether on the evidence this far led, same is not sufficient to shift the evidential burden onto his side to call for a response or reply.

[23] Under normal circumstances, when an application of this nature is launched, courts would go straight for the jugular and promptly decide whether a discharge should be granted or not at this stage.

[24] The trial this far was long and sort of involved. At a glance or in the eye of the uninitiated, one would say this is a run-of-the-mill case of murder and conspiracy to commit on or other offence. Not so in this case. This case is about hidden and/or sinister agendas perpetrated by shoddy characters as well as ostensibly crooked and/or greedy business persons. It is about corrupt civil servants as well as prominent politicians or politically connected people wining and dining with devils incarnates under cover of darkness.

[25] The accused's heads of argument extended to 220 pages and those of the prosecution cover 44 pages. Counsel for the accused argued for one and a half days whereas counsel for the prosecution did so for about 50 minutes. The defence's heads of argument are properly annotated with references to pages in the record of the proceedings to which the respective submissions or arguments relate. Unfortunately, the same cannot be said of the prosecution's heads of argument. Except for impressive references to case law at the beginning thereof where they set out the legal position the rest of the documents have bare statements un-annotated with reference to pages and/or parts of the record. Some of the assertions or allegations ascribed therein to specific witnesses were proven not to relate to those witnesses by counsel for the accused.

[26] Apart from the official recording of proceedings made during the trial a private company applied for and I granted it permission to also record the proceedings. It has so happened that each and every day following on the leading of evidence this Court, the prosecution and defence would be provided with a record or hard copy of the entire previous day's proceedings, weeks if not months before copies of the official recordings became available in dribs and drabs. I have taken the liberty of comparing the private recordings with my court notes and later with the official record and found out that the private recording was complete without any missing evidence. On the other hand, the official record as at a day before the date of argument herein did not contain the evidence of Stephen Mildenhall, Faizel Smith, Alexi Dimitri Christopher, the interlocutory application to have the evidence of the accused's bail application in the Magistrate's Court admitted, the evidence of Clinton Nassif on 5 August 2010 including cross-examination and re-examination, the application by the defence to have the proceedings adjourned pending their application to have the prosecution stopped in terms of section 6 of the Criminal Procedure Act including the ruling thereon and the evidence of the investigating officer, Col Van Heerden.

[27] It is so that some further recordings of the proceedings were distributed on the date of arguments but obviously they would not have been available to be cross-referred to in the heads.

[28] The above regardless, I am satisfied that all the parties herein had enough evidential material and exhibits to enable them to compile intelligible and helpful heads of argument.

[29] As the trial progressed I had to deal with two interlocutory applications. The first, by the prosecution, was for the accused's bail proceedings in the Magistrate's Court to be admitted as evidence in this trial. The second application was by the defence for this Court to hold up or suspend the proceedings while they approach the National Director of Public Prosecutions (NDPP) to quash the trial as there was no sufficient evidence and as such the trial was a waste of time. I dismissed both applications : the first one on the grounds among others, that section 60(11B) of the Criminal Procedure Act was not complied with in the sense that the accused was never warned by the Magistrate in terms of that section before his evidence was accepted into the record; the second one, on the ground that this Court is seized with this matter and as such was independent and/or could not wait to be told by the NDPP how this case should be concluded.

[30] I delivered full judgments on the two interlocutory applications and they form two separate parts of this judgment.

[31] Another aspect that characterises and distinguishes this ruling in terms of section 174 from everyday rulings is that we are also dealing here with witnesses who had been warned or admonished in terms of section 204 of the Criminal Procedure Act. This Court should be in a position to decide, at the

end of the day, whether indemnity or immunity from prosecution in future proceedings arising out of the same facts should be granted to each of those section 204 witnesses individually. To arrive at such a decision it is my considered view that each witness's testimony would or should be dealt with as completely as summation thereof would permit. That would be so because in the event of this Court deciding to grant any indemnity or immunity from prosecution, that decision should have been premised on the evidence actually led as qualified by cross-examination and the credibility of each witness may have played a part in that decision. The unfortunate flip side or converse of this is that in the event of section 174 not being granted, the whole process would have to be repeated at the end of the trial.

[32] Against the aforesaid backdrop I now proceed to set out as briefly as I can, the evidence that was led by the State in substantiation of the charges herein. *Ex abundandi cautela* in as far as those legally trained are concerned, but for the benefit of the legally un-initiated, acceptable evidence in a criminal trial is not just the say-so of a witness, i.e. what the witness tells the court in chief. It is that evidence as qualified or coloured by cross-examination.

[33] A witness may give an impressive rendition or account of an event or events but when such witness is cross-examined, all the good that he did may be partially or totally negated. The previous statements made by such a witness may be put to him/her and the cross-examiner may in that process succeed in casting aspersions or doubt on the veracity of his/her story and concomitantly on his/her credibility.

[34] In the peculiar context of this case, the statement(s) made by the witnesses who testified herein may play a pivotal role in determining the veracity of individual witnesses or laying bare the motive(s) or bases upon which the entire prosecution may have been founded.

[35] This Court is mindful of the fact that the decision to prosecute this accused alone was taken, not by the present team of prosecutors, but by a different one which included Adv Gerrie Nel and Special Investigator Andrew Leask. That initial team took a conscious decision to offer section 204 indemnity to all the culprits that took part in or actually executed the criminal acts that are the subjects of adjudication in this Court, i.e. the attempted murder of Mildenhall and the actual murder of Brett Kebble, whether it is called murder or assisted suicide.

[36] As the trial unfolded, especially from the evidence of the 13th and last state witness, the current Chief Investigator, Col Van Heerden, it is clear that some power play or absence or lack of common unanimity of purpose was the order of the day within the DSO *inter se*, the DSO and the SA Police Force proper as well as the DSO operatives and the DPP on the other hand.

[37] According to Col Van Heerden when a decision was made to start investigations in this case he was assigned as the Chief Investigator. Within a short time he was inexplicably removed as Chief Investigator and Andrew Leask was appointed or assigned. That was way back in 2005 and early 2006. Only during early 2010, in any event, after this matter was supposed to

have commenced in February 2010 but was postponed by Adv Nel with the concurrence of the defence, was he brought back into the case as Chief Investigator again.

[38] According to him, the atmosphere at the DSO or the Hawks offices as well as the DPP's offices was cold when he took over : He distinctly formed an impression or opinion that this case or its investigation played second fiddle to the prosecution in the case involving the former SA Commissioner of Police, Jackie Selebi. He and his team of fellow investigators and prosecutors were denied access to the boardroom that used to be the nerve centre of investigations herein, where dockets, affidavits and other relevant documentation relating to this case were also kept. Importantly, relevant and/ or material statements of witnesses that could have played pivotal roles in this prosecution were not handed over to the new teams. He pointed out that the fact that the accused herein was already in custody or arrested long before former Commissioner Selebi was and the fact again that Selebi's case was commenced with on trial before the accused's was, was also indicative of something not right or askew within the scheme of things.

[39] It was in the above context that Col Van Heerden professed lack of knowledge of an affidavit or statement of one Paul Stemmet who, according to the defence, was the trigger or cause for the arrest of both the accused and Jackie Selebi. He stated that it was not among the statements or dockets he received to continue with investigations herein. When Adv Hodes SC chronicled the chronology and importance of Paul Stemmet's statement in so

far as it related to this accused, Col Van Heerden agreed that that affidavit was relevant and material to this case and ought to have been at least disclosed and handed to the defence for purposes of preparing for this trial. Lead counsel for the prosecution, Adv Dakana, also professed no knowledge of this affidavit, meaning that the previous prosecutions team herein did not place all the tools of the trade in the hands of their successors. To venture an opinion why this was the case would amount to speculation on my part and I am not prepared to speculate on what they could be.

[40] To compound matters, when the accused was arrested on 16 November 2006, the basis therefore was the section 204 statements made by Nassif, Mickey Schultz, Nigel Mc Gurg and Kappie Smith, but notably that of Nassif because the others did not implicate him on anything. The defence was able to prove a point out that the section 204 statement of Nassif which was dated 8 November 2006 as well as those that preceded it made on 10 November 2005 did not implicate the accused in any wrongdoing in relation to any of the charges the accused is now facing. The supplementary affidavit by Nassif in which he now made mention of the accused as having been present at various meetings where conspiracies were hatched to injure or kill people was only deposed to on 30 March 2010 but he as Chief Investigator only received same on 13 July 2010 on the occasion of his second consultation with Nassif. This was after the latter mentioned it on the occasion of his first consultation with him on 9 or 10 June 2010 and that triggered his memory to remember that he once saw something similar in the possession of the previous investigations and/or prosecution teams at the DSO offices. This

important document was only handed to the defence on 19 July 2010. It should be mentioned here that this supplementary affidavit was not made in terms of section 204 of the Criminal Procedure Act.

[41] The above lends credibility to the defence's submission that the decision by the prosecution in July 2010 when this case resumed after it was postponed in February 2010, to amend the indictment so as to add the conspiracy charges, without prior warning or notice to the defence, nogal, was an indication that the amendments were predicated or informed by the contents of the supplementary affidavit of Nassif.

[42] Col Van Heerden also testified that the DSO's decision to grant section 204 indemnity to all the actual shooters or executioners of the plans to eliminate, permanently or temporarily, some of the victims mentioned in this case did not sit well with senior police officers and even the National Commissioner of the Police.

[43] This points to some kind of "*MUVHANGO*" (conflict or *dissensus*) somewhere in the innards of the DSO and DPP which is fortunately, no concern of ours here. Suffice to say that insofar as statements, affidavits, dockets, evidential material and anything that impacted on this trial was held back by the past or present investigations teams, both the State and the defence were hampered and the course of justice was somewhat hindered if not obstructed.

[44] This witness testified that he had not as at the date he testified in October 2010, obtained the statements of the complainants Dr Mark Bristow, Mark Bristow and Jean Daniel Nortier. He categorically stated that the accused herein, on the evidence at his disposal, did not attempt to kill or conspire to kill Stephen Mildenhall; neither was he present at the place where Brett Kebble was shot dead.

[45] The above witness's testimony did not substantiate the prosecution's opening address that he would come and tender evidence that connects the accused to the charges in the indictment herein.

[46] The first three witnesses, Schultz, Nigel and Kappie were the section 204 witnesses that did the actual execution of the plan to incapacitate Mildenhall and participated in the shooting to death by Schultz of Brett Kebble. Their rendition was like a scene from a mafia film – tragic, emotionless and comical – only that it was real and serious.

Mickey Schultz

[47] He met Clinton Nassif around 1994 when he was still working for Brian Mitchell Scrap Yard. Incidentally Brian Mitchell is the well known former World Boxing Champion and Schultz is a budding boxer. At the time Nassif owned and/or operated his own scrap yard or a used vehicle outlet called JAP Used Spares. They developed a close relationship and in 1996 started a business of re-building accident-damaged motor vehicles together. He was

there until 1999 when he went into the night club bouncer business. Bouncing can be loosely interpreted as a sort of work as a security officer or door-man at hospitality or liquor or related business concerns and bouncers were sort of enforcers used by owners to eject unruly patrons.

[48] In the year 2003 he started a security company with the name Effective Security, supplying guards or doing guarding services at business concerns and private homes or for individuals. At the same time Nassif started his own security company, CNSG.

[49] According to him Nassif told him that he was handling big contracts offered to him by the billionaire Kebble family. He offered him a position at CNSG as manager and he accepted. He started there in January 2005, his principal duties being to look after VIP's within the Kebble empire, mostly, if not exclusively the directors thereof.

[50] To put issues in a proper perspective the principal players in this case were the following as set out in the statement of case forming part of the indictment:

- The Kebbles, Roger and Brett were involved in various mining ventures, namely, JCI, RGE and DRD. Their main office was in Central Johannesburg.

- Brett was Chairman of the Board of JCI and RGE, controlling their day-to-day activities. Roger was Chairman of the Board of DRD doing there just as Brett was on his side of the empire. Roger was also a board member of JCI and RGE.

- John Stratton was an Australian citizen who held directorship in various companies incorporated in Australia and South Africa, including JCI, RGE and DRD. He became a director of JCI in 1998 rising to executive director there, assisting Brett in the management functions there. His main responsibilities were to develop new business, direct existing group activities, assist Brett in improving the financial position of JCI and its related group of companies, manage security and intelligence consultants and also manage ongoing litigation against the group of companies. He, like Brett kept houses in both Johannesburg and Cape Town and regularly commuted between the two cities.

[51] Mark Wesseley-Woods was appointed as a director of DRD in 1998. After his appointment he uncovered a series of irregularities within the company and ousted Roger Kebble from his position as chairman of the DRD Board. He instituted an extensive audit of DRD which led to a series of expensive litigation, both in Australia and South Africa, relating to alleged siphoning of money by the Kebbles from DRD. Among others the Kebbles were ordered to pay the amount of R40 million in March 2005 in respect of

such litigation between JCI and DRD. The above situation made the Kebbles and Stratton very unhappy, more so that it emerged that from 2003 JCI and RGE were shown to have been in dire financial straits, all factors that prompted Brett Kebble and Stratton to devise means of making Wellesley-Woods disappear – even permanently.

[52] Jean Daniel Nortier was the Chief Financial Officer of an entity called Aflease. During 2004 Nortier attempted to assist RGE out of its financial difficulties by entering into a share swap agreement involving Aflease, and RGE. It was part of the deal that the excess cash raised from the sale of RGE shares by RGE would be paid to Aflease. RGE failed to honour the agreement, precipitating letters of demand from Aflease lawyers to RGE. This bedevilled relations between them, especially Nortier, as both the Kebbles and Stratton were left exposed and their company's reputation shattered.

[53] Stephen Mildenhall was an employee of Allan Gray, a registered portfolio manager dealing mainly with investment portfolios. It handled JCI and RGE's investment portfolios. During 2005 Mildenhall discovered that both JCI and RGE had failed to comply with certain crucial listing requirements of the Johannesburg Stock Exchange. During July to August 2005 negotiations were under way between officials of Investec Bank and JCI with a view for the bank to grant JCI a loan to save it from a possible liquidation. Mildenhall was central to these negotiations. He proposed that in order for JCI to recover financially, Brett Kebble should not be allowed to

continue to have control over JCI and RGE. This infuriated the Kebbles and Stratton and they planned to harm him.

[54] Dr Bristow, the CEO of a subsidiary of RGE, Randgold Resources Ltd also insisted on Brett Kebble clarifying whether he had sold RGE's stake in Randgold Resources. He became a sworn enemy and the Kebbles and Stratton planned to harm him too.

[55] Nassif was allegedly introduced to the Kebbles and Stratton by the accused (Agliotti).

- Michael Schultz was employed by CNSG. Nigel and Faizel (Kappie) were long-time associates of Schultz.

[56] According to Michael Schultz in his testimony in court, Nassif had engaged a number of ex-policemen as investigators in his business among whom was Stephen Sanders. He came across most of them as he went about his business at CNSG. Among them was also Hennie Breytenbach, the Kebble's group's financial manager.

[57] Michael Schultz went on to state that apart from Brett Kebble and Stratton he also met the accused at Nassif's home. That is where he was told Agliotti had some business relationship with the then South African Police Services Commissioner, Jackie Selebi. Selebi's girlfriend was also set up in a

job at Santam Insurance Company through them but she was discharged there due to incompetence, whereafter Nassif gave her a position at CNSG.

[58] Michael Schultz further stated that at some stage Nassif told him of a hit-list which included Bristow, Nortier, Wellesley-Woods and Mildenhall. He said he was told by Nassif that the list was from Brett Kebble and Stratton. Details of the proposed victim's residential and work addresses were on that list. He was instructed to go to Cape Town to spy on one of the intended victim(s), Nortier, as well as Wellesley-Woods and Bristow in Johannesburg. He and his friends, Nigel and Faizel did so, monitoring their unsuspecting victim's movements and taking photographs of them and their houses and surroundings. Wellesley-Woods was even photographed while he was at his house in London.

[59] As a result of the surveillance processes Mildenhall was shot and wounded on his arms and shoulders in a staged "*hi-jacking*" or robbery in his driveway at Claremont, Cape Town on the evening of 31 August 2005. Mildenhall did not know that initially he was to be shot dead until the plan was altered by Brett Kebble, Nassif and Stratton to injure him instead.

[60] Other VIP's like the editor of Noseweek Magazine were also on the hit list because he wrote disparagingly about the Kebbles in his magazine.

- The photos allegedly taken during the surveillances were ultimately handed over to one of the investigators of this case, one Piet van der Merwe.

- Schultz gave greater details concerning the shooting of Mildenhall and Brett Kebble.

- Concerning Mildenhall his story was shortly as follows:

60.1 During the middle of August 2005 Clint Nassif informed him that Brett Kebble and John Stratton wanted a certain individual who was an auditor at Alan Gray Administrators in Cape Town eliminated. This person was Stephen Mildenhall. At first their mandate was to kill Mildenhall but later this was changed to an order that he be incapacitated for 2-3 months so as to ensure that a R500 million loan Brett Kebble and Stratton were negotiating with Investec Bank was finalised without a hitch. They feared that Mildenhall could jeopardise the deal as he was in possession of sensitive information that could be detrimental to the deal, more so that Mildenhall was insisting that the loan should only be granted on the condition that Brett Kebble is first removed from the control and boards of the JCI and related group of companies. Brett Kebble and John Stratton wanted him taken out of commission until they had achieved their

purposes. However, Brett Kebble was still removed from control of the companies.

60.2 Mickey approached Nigel and Kappie. The latter indicated that he knew of people in Cape Town who would do the job.

60.3 Nassif gave one of his employees, one Mohammed Mazibuko a cheque for R200 000,00 to cash at a bank. Mickey took the cash and they set off to Cape Town in a BMW X5 Sport Utility Vehicle (SUV) that was loaned to Nigel by a garage where he was purchasing another BMW for his wife.

Along the way just outside Colesberg in the Western Cape Province the BMW X5 collided with a wild animal and could not proceed with the journey as it overheated. They nursed it into town. Mickey phoned a friend of his in the tow business, Robbie Goswani to come and collect the X5 and also inform Nassif of their problem. They then booked into a Bed and Breakfast (B&B) for the night.

60.4 The following morning Nassif arrived accompanied by Robbie. Nassif hired them a Volkswagen Golf at a local Avis outlet. Nigel and Kappie proceeded with the trip to Cape Town and Mickey returned to Johannesburg with Nassif. He handed the R200 000,00 to Kappie. None of the conspirators, i.e. Mickey, Nigel or

Kappie brought their cellphones along : it was their *modus operandi* never to use their own cellphones to communicate with each other or with other persons, more so when they are travelling to the outside. This, Mickey stated, was to ensure that their movements were not traceable as cellphone or signal beacons would betray their whereabouts. For the same reasons they avoided using airports and planes as their movements would be traced. They used a pay phone to call Robbie.

60.5 He, Mickey drove back to Cape Town after a day to join his friends whom he found at the Waterfront Holiday Inn in Cape Town.

60.6 Nassif had given them a piece of paper with Mildenhall's personal particulars – his car registration numbers, make and colour, his home address and Alan Gray work address in Cape Town. Kappie and Nigel told him that they had already found two men who were willing to shoot Mildenhall for a fee of R150 000,00. They also told him that they had located his house number. They took him to the address to view it as they drove past. For communication purposes in Cape Town they bought a pay-as-you-go cellphone.

60.7 After three days of surveillance of the house in Cape Town they could not see anybody come and go from the house. They then went to his workplace at Alan Gray. Kappie sneaked into the basement parking lot and found the car fitting Mildenhall's car's description. They staked it and followed it after work to a house in the same locality as the one they had on the piece of paper, which looked exactly the same but only with a different street number. Mickey drove back to Johannesburg and Nigel and Kappie remained behind. Along the way to Johannesburg he (Mickey) was given a traffic fine which he said he dilly-dallied to settle or pay and which had the potential to compromise his movements or whereabouts.

60.8 That evening, when he was in Johannesburg, Nigel phoned him and told him t hat the work was done – meaning, Mildenhall had been shot according to plan. He told Nassif who ordered them to get rid of the cellphone.

60.9 The following day he met Nigel and Kappie at the scrap yard. They gave him Mildenhall's driver's licence as proof that they dealt with him as planned. They told him they shot him (Mildenhall) on both shoulders. He gave the driver's licence to Nassif. Nassif later told him (Mickey) that Brett and John Stratton were happy with the Cape Town job. He further stated

that the shooters were paid R150 000,00. The balance of R50 000,00 went to incidental expenses they incurred.

60.10 He emphasised that they were not paid for Mildenhall's shooting. What they were told was that they will be well looked after. They were satisfied with this as it meant they were being acknowledged as being the heavies of their world.

[61] Concerning Brett Kebble the story went as follows:

61.1 A week or two after Mildenhall was shot Nassif approached Mickey and told him that Brett Kebble wanted to be shot. At first he thought it was a joke but Nassif impressed it on him that Brett wanted to be shot dead. When he asked Nassif what the reasons were for this ridiculous request he told him that Brett had stolen a lot of money from his group of companies and he feared to go to jail for a long time. Another reasons Brett allegedly advanced was that he wanted to be remembered as a mattyre, not a thief; and that he wanted to save his reputation as well as those of his family and John Stratton. Nassif also mentioned that the fee for the job was R2 million.

61.2 He (Mickey) suggested that they hire killers from Cape Town but Nassif refused, saying that he did not want any come-backs.

61.3 He contacted Nigel and Kappie and they agreed to help with the job.

61.4 They hatched a number of plans or *modus operandi* about how Brett should die : that he be shot in his driveway and make it look like a robbery, shoot him as he walked or drove in the street, shoot him in the street and abandon his car at a place where the police can find it with his corpse inside, make Brett drive himself with him (Mickey) inside to a secluded spot where Mickey would then shoot him, shoot him in a restaurant : and so on. Mickey did not like them all. He had a number of reasons for rejecting them : the guards at his house, his fingerprints inside Brett Kebble's car, the unpalatable thought of driving with Brett for 5 minutes in the same car and then cold-bloodedly shoot him dead, the eye-witnesses that may recognise him in the street or restaurant. He suggested to Nassif that Brett Kebble could as well shoot himself dead or he Nassif shoot him dead.

61.5 Nassif ultimately came up with a novel plan : that Kebble drive after dusk along a dark and secluded street where they could shoot him dead and make a safe get-away.

61.6 He (Mickey) liked the plan.

61.7 Together with his friends, i.e. Nigel and Kappie, they scouted around Brett Kebble's area and found an appropriate area around Melrose Street and surrounds. It was agreed that Brett Kebble would drive around and upon seeing the assassin's car, stop at the shoulder of the road and open his car window. They (Mickey and company) would pull up alongside Brett's car, shoot him through the window and then disappear.

61.8 Mickey communicated this plan to Nigel and Kappie.

[62] On 22 August 2005, a week before Brett Kebble was shot dead Nassif took Mickey and Nigel to Brett Kebble's house : he stopped their car in the driveway near some open garage doors. Inside one of the garages Brett Kebble's silver grey Mercedes Benz S600 was parked. It had Cape Town number plates. The purpose was for Mickey and Nigel to familiarise themselves with the car which Brett would be driving on that day on which he wanted to be shot. Nassif then went into the house alone, leaving the two of them outside in the car, after Mickey refused to enter with him.

[63] After a while John Stratton came out of the house and waved at them and went back inside. Immediately thereafter one Andy Minaar who served as a Butler at Brett Kebble's house came out and saw them as they were inside the car. He also returned back into the house. They then went home.

[64] The same day in the afternoon Nassif told them that the job had to be done that same night i.e. 22 September 2005. He gave Mickey a handgun – a Smith & Wesson .40 – which he said was left with him by a hell's angel biker friend of his called Jethro from America to keep for him. It was to be used and then destroyed immediately.

[65] During early evening while he was resting, waiting for the appointed time to go do the job on Brett Kebble, Mickey received a phone call from Nassif's wife with a message to the effect that he contact Nigel and Kappie and tell them the meeting was off. He understood the message to mean that the shooting of Brett Kebble should not proceed that night. He arrived at this conclusion because there was no meeting to be attended to that night by him, Nigel and Kappie.

[66] Shortly thereafter he received a call fro m the accused on his cellphone : His message to Mickey was –

"*Call the boys off*."

He also understood this to mean:

"*Stop the shooting of Brett.*"

[67] He contacted Nigel and Kappie to relay the message. Nigel was furious and told him that he received a similar cellphone call from the accused. Mickey cooled him down.

[68] The following morning he (Mickey) confronted Nassif about the accused's previous night's message or instruction or order. He was flabbergasted that the accused also knew of the plot to kill Brett Kebble. Nassif re-assured him and told him not to worry as the accused was the person arranging for the payment of the monies they were to receive after the job was done. Clint told Mickey that the shooting should take place on the evening of 26 September 2005. It would be a Monday.

[69] On Monday 26 September 2005 Clint Nassif phoned Mickey and told him that Brett Kebble would be driving along Central Road in his suburb of Illovo and they should follow him. When they reached the pre-arranged area they should flash their car headlamps at him. When he stops Mickey should shoot him in the head and make sure he dies immediately. He did not want him to suffer. They should then get out of the area swiftly and then destroy the firearm. He further told them that if things go well (former Police Commissioner) Jackie Selebi would cover their tracks : he would preside over or supervise investigations that would be meant to obliterate traces of their complicity in the murder. That Selebi would delay any impending police action against them if things go wrong and that in the event of success he (Jackie Selebi) would keep them informed of developments during the investigations. He told him to keep his cellphone on, throughout.

[70] He (Mickey) relayed these messages to Nigel and Kappie. That very evening Mickey borrowed his wife's Volkswagen Golf GTi, collected Kappie and Nigel at their respective places namely, panel beating shop in respect of Kappie and Sandton in respect of Nigel. He had his licensed firearm with him wrapped in a plastic bag. The plastic bag was meant to catch or collect the spent cartridges when it was fired.

[71] On their way from Sandton to their alleged rendezvous with Brett Kebble the car started overheating. Due to traffic congestion the temperature meter went into the reds. They were forced to pull into Sandton Drive at The Baron business premises to ask for water. The water lowered the engine temperature and they proceeded towards their meeting area with Brett Kebble, whose car they met as they drove along Central Road going in the direction of Morse Antonio Restaurant. They made a U-turn, flashed their headlamps at it, which was a pre-arranged signal which would alert Brett Kebble that his shooters had arrived. According to this witness Brett Kebble acknowledged their signal by flashing his lights also. They followed his car as it turned left into Oxford Street, into Corlett Drive and left at a T-junction, into North Street, past the first traffic circle that is next to Planet Fitness.

[72] Their car had re-started overheating again as they followed Brett Kebble's car left into Edgecombe Road. When Brett Kebble turned right at the next street they took an exit over the freeway to the left and stopped at a nearby garage where they waited for their car to cool down. They had lost Brett Kebble.

[73] They abandoned the operation. Mickey dropped his two friends at their respective places and went home.

[74] The next morning Nassif came to his office at CNSG Security and he (Mickey) told him of their previous night's car problem. According to him (Mickey) Nassif told him that Brett Kebble was furious about their failure to shoot him dead and that he drove around in circles looking for them in vain.

[75] Later that very same day, i.e. 27 September 2005 Nassif came to tell Mickey that the job had to be done that same night. They agreed on a time an hour later than the previous day's time. They further agreed that the shooting should happen at the area around North and Edgecombe Roads where it was quiet.

[76] That evening Kappie arranged a black Volkswagen Citi Golf that belonged to one of his clients at his panel beating business. The client did not know of this. Mickey had a handgun in a kit-bag. From the Athol-Oaklands off-ramp to the M1 freeway they drove into North Road. Next to the Plant Fitness they saw Brett Kebble's car approaching. As it passed theirs they made a U-turn to follow it, flashing their headlights as pre-arranged. According to this witness Brett Kebble acknowledged the signal and slowed down. He turned into Edgecombe Road. They followed. Near Kings they agreed the area was quiet enough for their job. They flashed the headlights of the Golf Volkswagen again and Brett Kebble pulled his Mercedes Benz onto the shoulder of the road. They stopped alongside it. Mickey was seated in the

rear seat on the left, right opposite to where Brett Kebble was seated in the driver's seat of his car looking straight ahead, his two hands clasped firmly at the steering wheel. Fleetingly he (Brett) looked towards their car and their eyes met. It was the first time he saw Brett close. He (Mickey) pointed the firearm at his head and pulled the trigger. The gun jammed. As it was wrapped with a plastic bag he thought this was the cause of the non-fire. Brett Kebble drove forward and they followed. He turned left into a side street and stopped in the middle of the road. They pulled up alongside his car and Mickey pointed the gun at his head again. He had in the meantime cleared the chamber of the jammed bullet and re-cocked it. Brett Kebble was still adopting the same stance behind the steering wheel. He also raised his right shoulder without removing his hands from the steering wheel as if posing for a photo. Mickey pulled the trigger and again the gun jammed. He became anxious and confused. He even told him (Brett Kebble) to wait for him right there. Kappie made a U-turn and drove over a bridge across the M1 freeway while Mickey cleared the chamber, cleaned the gun and re-loaded the magazine and cocked it. They drove back to where they left Brett Kebble's car but it had moved. They followed it as it drove towards the intersection of Edgecombe Road and Melrose Drive. It stopped. According to this witness Brett Kebble looked at him, clearly disappointed. According to him the look in his eyes was like he was saying:

"*Hell man! Get done with this …*"

[77] Mickey reeled down his window, pointed the handgun at Brett Kebble and fired. He (Brett) was hit. He kept on firing, say, four, five times as his instructions were to make sure he died and died swiftly without suffering.

[78] They then drove off. As they went they saw car lights to the rear and Nigel said it looked as if they were being followed. In fact it was the headlights of Brett Kebble's car as it lurched forward towards some embankment nearby.

[79] They took evasive action until they reached Kappie's panel beating shop where a security guard opened the gate for them. Mickey cleared the gun's chambers, took out the magazine and handed the firearm to Kappie. The latter cut it up into pieces with an acetylene torch. Kappie was instructed to dispose of them. Nigel dropped Mickey at his home.

[80] The following day Mickey went to meet Nassif at their gym as agreed but the latter was not there. He phoned him and Nassif told him of Brett Kebble's death. He looked on the TV-set and saw how the death was reported thereon. According to him it was the hotline news of the day.

[81] Upon his arrival at the CNSG offices he found Nassif, Steven Saunders and Mc Ford in Nassif's office talking about Brett Kebble's death. He left them and when to his office. Nassif followed him there accompanied by Saunders and demanded full details of the previous night's shooting. Reluctantly he related their failure and ultimate success to him. His reluctance was based on

their pact that the Brett Kebble operation was supposed to be known only by Nassif, Nigel, Kappie and Mickey. Nassif re-assured him that Saunders knew of the operation. Later that day Saunders even remarked to Mickey that –

"*Brett got what he wanted …*"

[82] That afternoon he travelled with Nassif and Saunders to OR Tambo International Airport to collect Brett Kebble's father, Roger Kebble. At the airport they found some of CNSG investigators, namely, Dick Diederichs, Bossie, Burger and Beukes. These men were ex-security policemen who were now working for CNSG Security. The place was teeming with members of the press. The security men sneaked Roger Kebble via the restricted VIP section of the airport out of the view of the media and out of the airport. According to Mickey before they departed from the airport the accused joined them. The accused then left with Roger Kebble.

[83] After about a week they moved the location of their business. Shortly thereafter he (Mickey) happened to be in Nassif's attorney's offices. The witness did not elaborate as to why he was there. He only stated that the attorney, a Mr Tamo Vink, asked him to relay to him how the shooting took place.

[84] When he returned to their security company offices he confronted Nassif about Tamo Vink's enquiries and Nassif re-assured him that Vink was safe as he was his attorney.

[85] Mickey reiterated that when he did not receive his share of the promised R2 million for the Brett Kebble job, he pressurised Nassif over this and the latter told him that they were not being paid because John Stratton had not yet paid him. When they put more pressure on him he gave Mickey R100 000,00 in cheque form drawn on CNSG ordering him to cash it, give him (Nassif) R10 000,00 therefrom and then split the rest with Nigel and Kappie, which he did.

[86] Because he (Mickey) was the one who recruited Nigel and Kappie they put more pressure on him, he in turn put pressure on Nassif who paid them the rest of their money from the proceeds of a house he had sold. In fact Nigel and Kappie got their full R500 000,00 each and he (Mickey) did not receive the whole of what was due to him at the same time with the other two. The rest of the money was paid to him in drips and drabs until it was fully paid.

[87] Michael Schultz further testified that at some later stage the accused contacted him through an acquaintance of his and asked for a meeting at the Newscafe in Sandton. He (Mickey) went there but the accused was not there. When they were leaving for the Grand Club (Hatla) they met him, just arriving. He followed them there and he (accused) told him that he (accused) still had a very good relationship with Roger Kebble.. Also that Roger was willing to pay good money if he (Mickey) sees to it that Nassif was engaged in a bar brawl or fight. He did not come out clean about what should happen in that bar fight. What was apparent was that there was no love lost between the accused and Nassif and/or Roger Kebble.

[88] Michael Schultz was asked to explain how it came about that he be a state witness in this case. He testified that his attorney, a Mr Small-Smith, summoned him to his office and told him that the Police, specifically the Scorpions, were offering him an indemnity or discharge from prosecution in the Brett Kebble case if he was prepared to relate in court what happened, honestly and truthfully. At first he said he refused but he was later convinced that this was the only way out to avoid a lengthy prison sentence for his part in the murder. He and his attorney drew up a statement which was handed to the Police/Scorpions.

[89] This witness further stated that during the investigations where he made a full and detailed statement before the Scorpions he even took them to the various spots in Cape Town and Johannesburg where he pointed out the material points where different acts like surveillance, shooting and murder took place, including houses. He also participated in a series of reconstruction of scenes of crime where photos were also taken. Some of the photos also showed where the various victims mentioned in the indictment lived. This statement was made in terms of section 204 of the Criminal Procedure Act.

[90] The photo-albums compiled from the photos together with their keys were handed into the record as exhibits as stated hereinbefore.

[91] He stated further that at no stage was he arrested in connection with all the crimes that he was involved in that relate to the charges herein.

[92] During cross-examination by counsel for the accused Schultz conceded that –

92.1 the accused never conspired with him to murder Brett Kebble; and

92.2 accused never conspired with him to murder Jean Daniel Nortier, Dr Mark Bristow and Mark Wellesley-Woods.

[93] He specifically conceded that the accused never conspired with him or any other person to murder any person, that he never attempted to murder Steven Mildenhall or conspire with him to aid or procure the death of Brett Kebble, or murder Brett Kebble. He further conceded that the accused never discussed with him anything relating to Mark Bristow, Jean Daniel Nortier, Mark Wellesley-Woods or Steven Mildenhall.

[94] In relation to the Brett Kebble murder this witness stated that the accused only talked to him about him (Kebble) when he told him telephonically to call off the boys, which he understood to mean they should not go ahead to shoot Brett Kebble. He went on to state that he agreed to shoot Brett Kebble and organise the injury to Stephen Mildenhall out of the close relationship, loyalty and brotherhood that he had with Nassif. That he would do anything for him without questioning the motive or rationale or reasons as their relationship with him goes backwards and is deep and special.

[95] Insofar as all what happened in this case, he got all his instructions from Nassif and nobody else, hence he demanded and received all his payments from him. When he was not paid he never confronted the accused because insofar as he knew the accused was not involved in the planning of the "*hits*". He even stated that he did not accept Nassif's mention or utterances that the accused was involved – be it on the small scale of being a conduit for the finances from Brett Kebble through John Stratton.

[96] This witness further conceded that this accused never benefitted financially from the crimes or jobs set out in the indictment herein.

[97] He also stated during this period that he, Kappie and Nigel were together in the same office of their attorney Mr Small-Smith when they discussed the purported deal from the NPA and that he was aware of or had seen Nigel's statement when he made his. In fact their three statements made that day were identical in all respects, comma, full stop and all, except for their respective names and ID numbers. They were attested to by the same official and more importantly, at the same date and time. They even deposed to confirmatory affidavits to the effect that they had read each other's statements and they confirmed the correctness or authenticity of the contents thereon insofar as those statements related to them.

[98] For completeness sake the short statements that Schultz, Nigel and Kappie made are dated 14 November 2005. Their long section 204 statements are dated April 2006. Schultz's statement was finalised and attested to on 13 April 2006.

[99] It emerged during the cross-examination of this witness that he signed a third statement on 6 June 2007 in which he among others listed the cellphone numbers he was using at the time. The office one was 082 523 7953 and the private one, with numbers 082 559 6453, was registered in the names of one Lolly Jackson, who is known to be the proprietor of a string of Strip Clubs among which is the notorious Teazers franchise.

[100] The witness conceded that the meeting that he had with the accused at the Newscafe, Sandton subsequent to Brett Kebble's shooting and which was continued the same night at The Grand Strip Club in Rivonia was about the fact that Nassif was receiving money from the Kebbles or Stratton in respect of services rendered by various clients to them but which he kept for himself and did not pay over to the intended beneficiaries. He further conceded that at this meeting, at which one Malcolm Goodford and James Murray were present, the accused asked him (Schultz) to collect the amount of R1,5 million owed to him by Nassif in return for commission and he agreed. This is the meeting where Mickey was asked to organise a bar brawl with Nassif on behalf of Roger Kebble.

[101] Cross-examination further elicited a strange tale involving one Adv Barry Roux who happened to be Nassif's advocate : There was a meeting at Newscafe, Sandton attended by Nassif's attorney, Tamo Vink and his advocate Barry Roux as well as his (Schultz) attorney, Small-Smith where he was persuaded to be a section 204 witness. What is perplexing is the fact that it emerged during this trial that Adv Barry Roux was at some stage the prosecutor of a case where Nassif was facing fraud charges and in which the State withdrew all the charges against Nassif. There is further evidence that Nassif had received substantial amounts of money which were to be used to bribe the prosecutor, magistrate and investigators in that case. It is not clear if the bribery ever took place or not but clearly this is a scary state of affairs in relation to this country's criminal justice system if it is true. At some stage Schultz ascribed these allegations to a case involving Roger Kebble snr.

[102] The witness further stated that when Nassif re-assured him that former South African Police Commissioner, Jackie Selebi, would take care of and/or smooth over any problems that might arise following the shooting to death of Brett Kebble, the accused was not present or involved.

[103] During re-examination Michael Schultz explained that he agreed to help retrieve the monies owed to the accused from Nassif because despite any fall-outs that may have occurred he (Schultz) was the only person who could talk to him (Nassif) and make him see reason.

[104] The next two witnesses, Nigel Mark Mc Gurg and Faizel "*Kappie*" Smith corroborated the version given to court by Michael Schultz both in relation to the Mildenhall shooting and Brett Kebble's death. I will not regurgitate their versions save to highlight a few aspects. I will start with Mc Gurg. He was also a section 204 witness.

[105] The thrust of his evidence was that he and Schultz were feared hustlers in the nightclub bouncing business world and they had a reputation preceding them. They both branched into the security industry and ended up both working for Nassif at CNSG Security. Clint used them as "*button men*" in *Cosa Nostra* or Mafioso *lingua* franca. He said they were the "*muscle*" of his business and he used them to intimidate people or do his "*dirty*" work. They were his enforcers and money collectors from people owing him money.

[106] Nigel also corroborated the incident involving Mildenhall in Cape Town. He added that after the two coloured men shot Mildenhall, they were paid their balance of R100 000,00. They had been paid a R50 000,00 deposit. One of the guns they used was the Smith & Wesson .40 that Kappie brought along to Cape Town. After the shooters were paid, the gun was retrieved from them and dismantled. The pieces were thrown out of the car window on their way back to Johannesburg. The other articles taken from Mildenhall were burnt under a bridge along the freeway. Only his driver's licence was kept as proof that the job was done.

[107] He confirmed Mickey's version that he, Mickey and Kappie were not paid in cash for the Mildenhall job. They were satisfied with the recognition and respect they would get as "*men of action*" and the fact that Brett Kebble would take care of them in future.

[108] Regarding the Brett Kebble murder Nigel corroborated Michael Schultz's version. This witness did not mince his words about his hatred for the accused : He particularly disliked the way in which the accused referred to him and his friends and colleagues as "*boys*" and the expression he used when he came across them in which he (accused) would say –

"*Show me love, show me love.*"

[109] He particularly hated the fact that the accused was, according to him, "*Loud-mouthed*" i.e. he talks too much, hence he was particularly pissed off when he realised that the accused knew of the Brett Kebble plan. He was however assured by Nassif that the accused was an important cog within their nefarious machinery in that he was in charge of the finances.

[110] He corroborated the story of how Brett Kebble was killed. According to him, when Michael Schultz's gun ultimately went off, he fired –

"*… 5-6-7-8-shots …*"

into Brett Kebble's body.

[111] Nigel got or received all his instructions from Mickey, never from the accused or any other person. He testified that they started exerting more pressure on Mickey to demand their money from Nassif after learning or deducing that he was about to emigrate to the USA. That is, according to this witness, when they met with the accused at the Newscafe, Sandton and ultimately, The Grand, in Rivonia and the accused allegedly told them that he (i.e. accused) had paid over the monies due to them to Nassif. That is also when the accused told them he was owed R1.5 million by Nassif and wanted help to retrieve it. That is again when the accused suggested that Nassif be led into some bar brawl.

[112] He confirmed the pointing outs that he made to the police that appear in the photo-albums that form part of the Exhibit "D" bundle admitted into the record of proceedings.

[113] Nigel also was never arrested. He and Michael Schultz shared one attorney, Mr Small-Smith. He called them in together with Kappie and told them of the section 204 offer from the Scorpions that came in through Nassif's legal representative, Adv Barry Roux. After initially declining the offer Small-Smith convinced them it was the only way out if their wanted to avoid prison.

[114] He made his initial statement in the presence of Mickey and Kappie to Small-Smith on 14 November 2005 and the section 204 one to the Scorpions on 26 January 2007.

[115] Nigel testified that he assumed there was a relationship, business and/ or otherwise, between the accused and Nassif because the accused frequented the premises of CNGS. He even thought he was a director.

[116] Nigel in actual fact said almost nothing that implicated the accused with any of the offences in the indictment herein. Of peculiar interest is the fact that right at the beginning of cross-examination by Adv L Hodes SC for the defence, apart from conceding that the accused never conspired with any person to murder or injure any of the people mentioned in the charges herein or attempting to murder Stephen Mildenhall or procuring or setting up the death of Brett Kebble or actually murdering Brett Kebble, upon a simple question by the defence as to how he knew that the accused controlled the payments due to the Kebble or Stratton enforcers, his reply was that The Scorpions (SA Police Unit that has been changed into The Hawks) highlighted to him during his consultations with them or interrogation that he should all the time emphasise that the accused controlled the purse strings of the Kebbles and that he actually had a meeting with him where he (accused) told him the money due to them for the Brett Kebble murder was paid to them by him (accused). Unfortunately under further intensive cross-examination this witness admitted that the accused was according to him not involved with the issues contained in the indictment herein. If what he said earlier is true, then the Scorpions were busy misleading the court on this aspect.

[117] Despite the above concessions counsel for the accused proceeded to discredit Nigel thoroughly, highlighting inconsistencies and contradictions in his version in court *vis-à-vis* his written statements and extracting the existence of his fervent hatred for the accused. This witness totally negated what he testified to in chief, even coming up with different versions of the same aspects in his answers to questions. To avoid further embarrassment he responded to the barrage of question by stating that after the death of Brett Kebble he took a conscious decision not to read newspapers, or listen to news broadcast, both on the radio or television. He told that as a result he was not aware or up to speed with how the death of Brett Kebble was dealt with in the media.

[118] Nigel further confirmed that it was their habit as a closed group, not to use their own cellphones to communicate with each other or discuss deals and jobs. In this instant, to call accused he used his registered personal phone. He agreed that if the accused was involved in the conspiracies he would not have used his personal cellphone.

[119] Nigel was convinced that all the money Nassif paid to them was given to him by the accused, hence he detested him for no paying them on time. The source of his belief was Nassif. According to him (Nigel) Nassif told them all monies from the Kebbles or Stratton came to him through the accused.

[120] Actually Nigel was supposing or speculating about all these connections he ascribed to the accused. His catch phrase or language was that Nassif will confirm all the above concerning the accused, when he comes to testify. Suffice to state here that Nassif did not confirm this version.

[121] As stated above Faizel Smith aka "*Kappie*" also a section 204 witness corroborated Schultz's evidence in all material respects. He was taking his orders from Mickey and did not connect the accused in any way with the charges herein. He confirmed the sequence of events as set out by Mickey in respect of Mildenhall's shooting and Brett Kebble's murder. It will serve no purpose to repeat what he said here, save to state that he expressly exonerated the accused of any wrongdoing against all the people mentioned in the indictment as victims.

Steven Craig Mildenhall

[122] His testimony was that during 2005 he was the CEO of Alan Grey in Cape Town. He also occupied the positions of Chief Investment Officer and portfolio manager. He met Brett Kebble a few times before – around shopping centres and like places. Although JCI was not a client of Alan Grey, as investment officer he was interested in companies like it.

[123] During 2005 around July, JCI and RGE were warned of possible suspension from and by the Johannesburg Stock Exchange for failing to submit their financials. They were granted an extended period to do so.

[124] During the above period Steven Mildenhall or Alan Grey were contacted by Investec Bank and they wanted him to evaluate the recently discovered gold deposits at Western Areas Gold Mine, another of JCI or the Kebble stable of businesses. He was also doing a due diligence on JCI and RGE regarding a loan JCI and/or RGE had applied for at Investec Bank.

[125] While still doing this JCI and RGE were suspended by the JSE on 1 August 2005. He stated that among his findings was that JCI had sufficient or a lot of assets but low liquidity, which could have disastrous consequences if not harnessed or arrested in time.

[126] He was mandated to evaluate JCI's loan application and make the necessary recommendations to Investec on the way forward. Alan Grey recommended the loan but subject to the pre-conditions that –

126.1 The board of JCI be re-configurated or re-constituted; and

126.2 Brett Kebble resign as Chairman and Board member of JCI, RGE, Western Areas Mines as well as other companies in the Kebble Stable.

[127] He (Brett Kebble) was removed from the Board of Western Areas but remained on the Boards of the other companies.

[128] On 15 August 2005 he (Mildenhall) signed a letter recommending a loan to JCI subject to pre-conditions. On 30 August 2005 the JSE released the details of the loan to the public.

[129] On 31 August 2008 at the end of the day's work he was interviewed on national radio about the re-constitution or re-configuration of the JCI and RGE Mine Boards. After the interview he drove to his home in Claremont, Cape Town. Upon arrival he opened his electronic motor gates and drove into the driveway inside the yard. At that very stage, before he could alight from his car he saw two men get out of a red car parked outside his yard. They ran to and opened the small pedestrian gate at the entrance and both had guns in their hands. They pointed their guns at him and one of them demanded that he empty his pockets and hand over all the contents to him. He complied, handing over to the man a wallet, car keys, house keys and cellphone, among others. They then ordered him to accompany them but he did not comply. Instead he retreated, moving in reverse towards a carport nearby. The two men then opened fire, hitting him three times on the area around his shoulders. He fell down and the two men drove away in their car. He was taken to the Claremont Hospital where he was treated and released after 8 days.

[130] He considers himself fortunate because the injuries he sustained were not of a serious or permanent nature and the only complaint he still has is restricted movement around the shoulders.

[131] His house is situated next to a primary school.

[132] Cross-examination elicited the following:

132.1 Initially he thought his shooting was a purely criminal act although he had some disquiet about one of the guns having had a silencer fitted to it. To him, this was too coincidental with his dealings with the Kebble business empire. He only connected this shooting to the JCI-Brett Kebble link when stories started hitting newspaper headlines after Brett was gunned down.

132.2 He does not know the accused, neither did he then, now or ever have any dealings with him, be they personal or business related.

[133] Johanna Petronella Heynecke, Charl Johannes Naudé and Hilda du Plessis were respectively, the Forensic Liaison Manager at Vodacom Cellular Services, Risk and Fraud Manager at Nashua Mobile and Specialist Forensic Analyst at MTN Cellular Services.

[134] All three were called by the prosecution to tender evidence about certain cellular phone calls which were made to or from certain cellular phones registered to or in the names of the accused herein and/or Nassif, Schultz, Nigel, Brett Kebble and CNSG. Their testimonies mainly traced how

the various incoming or outgoing calls from those cellphone numbers were received at or by specific base stations or towers situated at different locations ranging from Alberton in the East; Comaro, Glen Vista and Rossettenville in the South of Johannesburg; Anglo Plat Head Office, Zoo Lake, Newlands, Chissel Hurston, Wemmer and Auckland Park near the Johannesburg City centre and Oaklands, Inando, Wanderers, Illovo, Fernwood, Forest Hill and Empire to the North of the city as well as Keurboom, Fernwoods, Newlands and Cape Town itself in the Western Cape.

[135] All these "*experts*" in communications could not say who was using any particular cellphone at the time its use was picked up by any of the base stations or towers. The fact that a call may jump from a principal cellphone registered in the names of a particular user to a secondary phone, mainly a car phone, used by such user did not help the situation.

[136] They could not exclude the manipulation of cellphone records by unscrupulous persons. Further, contrary to their assurances that cellphone records were only issued out upon receipt of a court issued section 205 subpoena, cross-examination of Hilda du Plessis, for example, elicited evidence to the effect that there were instances where she issued out such records well before a section 205 subpoena was even applied for : She relied on the *bona fides* of a police officer in a faxed message, that she send out to the latter the cellphone records and the requisite section 205 subpoena would follow later.

[137] Ms Heynecke for instance testified that she had furnished the police with about 50 lever arch files full of cellphone records in respect of various people. Nobody could shed any light to this Court what could have happened to all that data because only a handful of data was handed in and used as exhibits in this case.

[138] Abuse of the system by the police was demonstrated by Hodes SC during cross-examination of these cellphone "*experts*". For example, he elicited evidence to the effect that cellphone records of the accused's attorney; himself, Hodes SC, accused's counsel herein; his (Hodes') father's, also an advocate who has nothing to do with this case; other clients of accused's counsel, Hodes SC like one Peter Skeet; phones of private attorneys' firms and private investigator Warren Goldblatt; among many others, were subpoenaed and obtained by the police from the cellphone companies.

[139] This elicited a question from me at one stage to the effect whether if and when this country's State President's phone records were subpoenaed, whether they (the cellphone companies) would issue them out without much ado. The answer was that those records would be extracted and handed over without asking another question.

[140] It is my considered view that if this state of affairs did occur or does occur and is allowed to persist, WE SHOULD ALL BE AFRAID, VERY AFRAID!!!

[141] The *prima facie* view of this Court at the time the evidence of cellphone records was led was that there would be evidence led later that would causally connect the accused herein with one or more of the transgressions set out in the indictment herein through this type of evidence. With hindsight, it appears to one as if the State was placing booby traps along the way the prosecution expected or anticipated or hoped the accused would travel in the hope that if he does, he may detonate any of the explosives so laid out in anticipation. It is like covering a roadway with rocks in the hope that a certain motor vehicle would be travelling that roadway and may per chance, in the process of negotiating those rocks, damage its sump on one of them and travel no further. By the above I mean, when one looks at the evidential value of the cellphone records, one can be excused for thinking that the evidence was placed on record in the hope that when the accused does cross the floor to testify in his defence, he may tie himself in knots or trip on one or more of such evidential material.

[142] The above is but a hunch that flashed across my mind. It is not a finding of fact or law I am making regarding the proof of guilt or otherwise of the accused.

[143] Charl Johannes Naudé's evidence does not take the matter any further. He is employed by Nashua Mobile in Midrand as a Risk and Fraud Manager. He is with that company in the same category for 9 years 6 months. He deals with court testimonies regarding authenticity of accounts and also takes care of risk matters including fraud internally and externally.

[144] His testimony was short and sweet : He was subpoenaed two days before he came to testify on 16 August 2010 about the ownership of cellphone numbers 082 805 6286, 082 807 7752 and 083 633 1803.

[145] The circumstances under which he was subpoenaed were as follows:

145.1 On 12 August 2010 he was telephoned by the Investigating Officer in this case, Colonel Van Heerden, about him coming to testify at court on 16 August 2010.

145.2 He allegedly was served with a subpoena on the strength whereof he checked through Nasua records and found out that the abovementioned three cellphone numbers were registered to Consolidated Mining Management Services. Under cover of a statement he submitted the data sought to Col Van Heerden.

145.3 He further stated that the above numbers were allocated to users as follows:

(a) 082 805 6286 was allocated to John Stratton;

(b) 082 807 7752 was allocated to a Kebble; and

(c) 083 633 1803 was allocated to one Wilson whose full and further particulars he did not know.

[146] His was a simple open and shut version indeed but cross-examination elicited a different story. It can be summarised as follows:

146.1 It emerged that this witness was previously in the SA Police Force for 11 years and worked with the Investigating Officer, Col Van Heerden in the same Serious and Violent Crimes Unit. It further emerged that the subpoena he used as authority to provide personal client data to the investigators in this case was not a section 205 one but an ordinary witness subpoena – contrary to the prosecution team's argument and submission that such information can only be accessed through a section 205 subpoena.

146.2 The witness stated that he deliberately waived the 14-day time frame allowed for a witness on subpoena to come and testify in court, hence he was approached on Saturday and he accessed the data and was in court testifying the very following Monday.

146.3 It also emerged that the number allocated to John Stratton has since been re-allocate and the witness does not know to whom. Even though according to him the number was in Stratton's names until 4 August 2008 he does not know who used it all the time.

146.4 In respect of the number he said was allocated to a Kebble he could not say if it was Roger Kebble or Brett Kebble. Worse still, it was used by that Kebble from 10 January 1996 until 30 January 2003. He could only assume that since normally or usually if a contract is not renewed, it becomes a monthly one, that that may have been the case with this number without any substantiation. This reply is in spite of the fact that he (witness) testified that he obtained his information from Nashua's data base. How a continued-use-phone is not detailed on this data base is so ridiculous that this Court tends to agree with the counsel for the defence that this (witness) could not have assessed proper and/or appropriate data. This aspect was aggravated by basic errors or mistakes on the alleged subpoena itself : It was allegedly issued, on the face of it on 12 August 2010. His accompanying statement however is dated 13 July 2010 and attested to on a date that is still to come, i.e. 16 September 2010. It will be difficult indeed for this witness to convince this Court he was telling the whole truth.

146.5 He further stated that the 082 807 7752 number was twinned to a car cellphone with numbers 082 807 3694 but could not explain why he did not testify about it, let alone not produce data related to this twin phone. This, despite the fact which he admitted, that the twinned phone's billing was incorporated into the main cellphone.

146.6 It further emerged from this witness's testimony that the number 083 633 1803 which according to his records was used by one Wilson, started operating on 18 January 2000 until 2 February 2003 when the contract lapsed. If then went onto a month to month use. He does not know who Wilson was. He could not explain the inconsistent and clearly wrong dates on his sworn statement, neither could he explain why he issued sensitive data on the strength of an ordinary witness subpoena. He consequently was at sixes and sevens when the defence put it to him that he did not follow his department's own protocols and was clearly doing a favour to an old colleague. He could not produce any documents generated from his company's data base to substantiate his evidence in court. It was not surprising when he answered, "*… Yes*", when it was put to him bluntly that he was lying.

146.7 During re-examination, the prosecution elicited evidence to the effect that a subpoena was not necessary to access and obtain client data from Nashua Mobile, which piece of evidence negated what the prosecution had been insisting on to be the correct procedure, namely, that a section 205 subpoena was essential before such sensitive client data can be accessed and/ or released.

[147] Naudés evidence should be placed alongside that of Linda Maureen Viera an employee of Consolidated Mining Services Ltd as both purported to testify about almost similar, if not similar cellphone numbers. Her testimony can be summarised as follows:

147.1 She is an assistant director at Consolidated Mining Services Ltd, a subsidiary of JCI Ltd, since 1996. Brett Kebble was the CEO of the company and also director thereof.

147.2 She was approached on 19 August 2010, i.e. the Thursday preceding Monday 24 August 2010 on which latter date she was testifying, to come and confirm ownership or registered use of the cell numbers 082 805 6286, 083 633 1803 and 082 807 3694. She has, attached to her written statement dated 24 August 2010 (date of evidence in court) two sheets marked Annexures or Exhibits “U2” and “U3) which contains cellphone numbers which she, in the course of her employment applied for and noted in the records of Consolidated Mining Services Ltd. Exhibit “U2” contains 27 cellphone numbers with their users recorded alongside them. Exhibit “U3” contains 34 such numbers. The numbers on “U2” and “U3” overlap, i.e. there are some that are on both exhibits.

147.3 According to her, number 083 805 6286 was allocated to John Stratton, number 083 633 1803 was allocated to Brett Kebble although it was applied for in the names of a fictitious or non-existing "*Wilson*". This Wilson neither works for the company nor exists. Number 082 807 3694 was allocated to Brett Kebble also. She testified that it was standard practice at her company, after one of JCI's mines, Westonaria Ltd, encountered problems of liquidity or with the SARS, for Brett Kebble's personal assistant, Rita Mininghouse, to instruct her to apply to service providers for cellphone contracts in the names of fictitious persons and she complied. To illustrate this:

147.3.1 <u>On Exhibit "U2</u>"

Number 082 809 4157 is supposed to be used by one Du Plessis, whereas in actual fact it was used by John Stratton. Du Plessis was a fictitious person.

As stated above 083 633 1803 was used by Brett Kebble although registered to Wilson who is a fictitious person.

In addition, Brett Kebble also used number 082 941 4910.

147.3.2 On Exhibit "U3"

Number 084 601 0250 is supposed to be used by or registered in the names of "*Brown*". However, Brown is a fictitious person. The cellphone was used by Brett Kebble.

Number 083 628 6010 is registered to "*Flesch*" who is a non-existent person. It was used by Brett Kebble.

Number 083 633 1842 is registered to "*White*" who is also a fictitious person. It was used by Brett Kebble.

[148] This witness testified to the effect that she was certain about what she said because she was the one who applied for the phone contracts and even paid the bills out of the company coffers. She even regularly updated the cellphone user list each time a new contract is added or an existing one is terminated.

[149] Under cross-examination this witness conceded that although she allocated specific cellphones to specific people she could not vouch that those cellphones were utilised by the allocatees. She also agreed with Andrew Minaar's testimony that there are many more cellphones which included pay-

as-you-go ones which are not recorded on Exhibits “U2” and “U3”. She could equally not say whether or not Messrs Fikile Mbalula and/or Mcwana, both of the ANC Youth League were users of some of the cellphones.

[150] In answer to questions for clarity by this Court the witness stated that all the contracts’ addresses were Consolidated Mining Services Ltd. Rita Mininghouse passed away during 2009.

[151] The State also introduced the evidence of one Steven Colin Sanders, who had been mentioned repeatedly by the prosecution’s main witness, Clinton Nassif. His version can be summarised as follows:

151.1 He was employed at CNSG as the operations manager during the year 2005. Before that he was an employee of AIN Security which was also owned by Nassif. Prior to all the above employments he was a policeman who was attached to the then specialised units in the old South African Police. Koevoet’s name came up in evidence. He met Nassif when he was still a policeman and he renewed that acquaintance in 2004 when he worked with or under him at AIN Security. Koevoet was a counter-insurgency specialised and highly trained paramilitary unit of the police in the old days which was deployed in war-zones in Namibia and Angola.

151.2 He met the accused through Nassif at a golf course during 2004. He stated that he had accepted employment overseas in 2006 and was bidding Nassif farewell when those introductions were made.

151.3 One can assume that this witness was made an offer he could not refuse to change his mind about working overseas and instead work for Nassif at AIN and CNSG because that year, 2004, when he was supposed to go, he instead started working for Nassif.

151.4 He met John Stratton towards the end of the year 2004.

151.5 He was introduced to Brett Kebble by both Nassif and Stratton after seeing him on three previous occasions in and around their offices at the security companies. He also knew one Maro Sabatini through Nassif. According to him, during August 2005 Nassif enquired from him if he knew of any pill that could induce a heart attack but which would not be detected during a *post mortem* examination or autopsy. Without asking who the intended user of the pill was he promised to make enquiries about it. He in fact did not initially think Nassif was serious and he forgot about it, only to be reminded about it two (2) weeks thereafter. He stated that Nassif told him that he was taking too much pressure relating to that pill's availability from Brett

Kebble, John Stratton and the accused. It was only at this stage that Nassif told him the pill was intended for Brett Kebble at his (Kebble's) request and that Brett Kebble was dead earnest on obtaining the pill to kill himself but in such a manner that his insurance companies would not suspect suicide and would thus pay out death benefits to his family.

151.6 He further testified that Nassif asked him if he was prepared to "*make a hit*" on Brett Kebble, i.e. kill him. He refused.

151.7 Two weeks after the above encounter he happened to be at the offices of one Hennie Buitendag, the financial director at JCI Limited, when he met John Stratton. The latter called him aside and asked him if he was able to find "*the stuff*". He immediately assumed and knew he was referring to the heart attack inducing pill. He told him he had not. Stratton then received a cellphone call. He (Sanders) went to a newspaper stand and started paging through a magazine when Brett Kebble walked in and asked John Stratton if Nassif had found what he was looking for. Stratton responded by telling Brett Kebble that he had just asked him (Sanders) about it and that they were still looking for it. Brett Kebble became upset and walked away in a huff.

151.8 The witness further stated that in fact he never endeavoured to look for such a pill.

151.9 He also recounted how a relationship of such closeness as that of father and son developed between himself and Stratton. He would even pick him up at the airport at his bidding whenever he came up to Johannesburg from Cape Town.

151.10 One afternoon in August 2005 Nassif asked him to accompany him to Cape Town, as Stratton wanted him to come there. He said Nassif told him that he also did not know why he was summoned to Cape Town. They indeed flew together to Cape Town, the same afternoon, booked into a hotel where they left their luggage and drove to Stratton's house in a hired car. Stratton met them outside his house and invited them inside. When standing in the kitchen Stratton told Nassif that he wanted him to do something for him urgently. They stood aside, but within ear-shot, and he could hear Stratton talk about Mildenhall, an address and words "*… Done immediately*". After a while they walked towards where he was reading a book about Sushi making. He (Sanders) then asked him if he knew how to prepare a sushi, whereupon he (Stratton) walked behind a counter nearby and took out a collection of sushi knives from a place there. He (Stratton) selected the smallest of those knives and pushed it over to Nassif across the table. Nassif picked it up. Stratton wrote an address on a piece of paper and

handed it over to Nassif, who in turn handed it to him (the witness).

151.11 As they drove away from the Stratton home, Nassif told him that the Mildenhall Stratton was talking about was a person who was going to testify against Brett Kebble in the near future and that the order from Kebble and Stratton was that he should be incapacitated for about or at least 3 months so that he would not testify. He (Stratton) wanted him (Nassif) to go and so incapacitate that Mildenhall the same evening.

151.12 On their way back to their hotel they drove past the address Stratton gave to Nassif.

151.13 He (witness) told Nassif that he wanted no part in that scene. Nassif also told him he would not comply with Stratton's order. That he would later talk to Stratton to devise another plan to execute his wishes. They then flew back to Johannesburg the very same day.

151.14 A couple of weeks later he read in the papers about Stephen Mildenhall having been shot in or on the shoulders. At the time he did not link that shooting with what was said on the day he was at Stratton's Cape

Town house with Nassif. Only when this case started did he realise that Mildenhall's injury was related or connected to that discussion.

151.15 This witness further testified about the various meetings that he had with Stratton, Nassif, Sabatini as well as Brett Kebble, the latter only once. The meeting with Brett Kebble was on a day when he had driven Nassif to a meeting at Brett Kebble's Inanda house. Nassif's attorney, Tamo Vink and Stratton as well as the accused were also present and their discussion revolved around Kebble's troubles with the SARS about his taxes. At a stage during that meeting he heard Stratton talk about a R12 million that was allegedly given to Jackie Selebi, the then SA Police Commissioner to make their problems disappear. He was agitatedly demanding the return of that R12 million from the accused.

151.16 He professed ignorance of any issue to be discussed in Cape Town. He also denied any dealings with Chubb Security or having at any stage accompanied Nassif and the accused to Cape Town to discuss any Chubb issue or business with Brett Kebble or Stratton or with both of them together.

151.17 According to him or his observations the accused had good relations with Kebble, Stratton and Nassif. He had in the past observed that Brett Kebble would give instructions to Stratton who in turn would give them to the accused. Hence he said the accused seemed to operate like a middle man in the dealings between Brett Kebble, Stratton and Jackie Selebi, the ex-National Police Commissioner.

151.18 He went on to state that the accused would visit or be with Nassif at least once a week. His statement was made under section 204 of the Criminal Procedure Act and it was also used during the criminal trial of Jackie Selebi where at the end thereof he was given indemnity from prosecution.

[152] Under cross-examination it emerged that this witness swore to two statements about the same issues. His first statement was identical to the one made by Nassif, full stop, comma and all, differing only on their names, identity numbers, addresses and contact phone numbers. It further emerged that he was, during his police days, a highly trained specialist on firearms, ammunition, explosives as well as combat and counter-revolutionary and intelligence work. He acknowledged being an expert on surveillance and other under-cover operations. He had, in his work at AIN Security and CNSG, followed people, monitored their movements, taped their conversations and

intercepted their messages, among others. He had no attorney or counsel of his own, hence he utilised Nassif's attorney and counsel, Tamo Vink and Adv Barry Roux respectively, especially when he made statements to the police. Hence even his statement(s) was completed and sworn to at Adv Barry Roux's chambers at Sandton, Johannesburg.

[153] This witness did not implicate the accused in any manner in or on any wrongdoing, let alone anything connected to the charges in the indictment herein. He further stated that the accused never discussed anything with him at any stage, specifically, not the object or subject of the charges herein.

[154] The evidence of Dominic Ntsele was also led.

154.1 He is a media relations officer and Brett Kebble was one of his clients from the year 2000. They would meet weekly whenever Brett was in Johannesburg. At times he would meet him at his (Kebble's) Cape Town residence. They also communicated by phone, SMS and text messages. The regular number of Brett that he used and knew was 083 267 6981. At times they would use Brett's 082-number, 082 087 7752, which was a secondary car phone linked to his main cellphone.

154.2 He visited the deceased the day he was killed : In fact they had an appointment for the previous evening, i.e. 26 September 2005, but it fell through or did not materialise because Brett did not turn up.

154.3 He did not know the accused before this Court very well : he only met him at Brett's funeral. Mickey Schultz, Nigel, Nassif and Kappie Smith were unknown to him.

154.4 Under cross-examination the following came out:

154.4.1 His police statement looked strikingly similar to that of Mr Minaar, Brett's butler in type-set, format and paragraphing.

154.4.2 At no stage did the deceased tell him that he wanted to die.

154.4.3 On the night of his death the deceased was cheerful. He found him playing on his piano. He looked like he had taken alcohol but his motor skills were not impaired. He said the deceased had a huge capacity for alcohol but during his presence on this day he drank from one red-wine bottle only.

154.4.4 He was so jolly on the night that he even suggested they drive together to meet one Sello Rasethaba but he politely declined. He summised that had he agreed, he would also have been killed because the deceased was shot after they separated on leaving his house – he (witness) going home and the deceased going to meet this Sello. The deceased even personally prepared the steak and chips they both had for dinner that night.

154.4.5 The witness reiterated and emphasised that he was strict on time and appointments, hence he sent the deceased a strongly worded SMS after the latter stood him up on their appointment on 26 September 2005. He would not compromise his reputation by allowing himself to be persuaded or cajoled into dovetailing his story with that of others especially where he knew he would not be telling the truth.

[155] Alexis Dimitri Christopher also testified for the State and he stated the following:

155.1 He is the owner of Assagi Restaurant at Hyde Park. He knew the accused by coincidence after one of his employee's vehicles collided with the accused's. After that they became friends.

155.2 He knew Brett Kebble from their youth days when they both lived in Welkom, Free State. He does not know Brett Kebble's home in Johannesburg save the fact that it is situated somewhere in Hyde Park, Johannesburg or Illovo. He also knew Clinton Nassif.

155.3 After his acquaintances with the accused they all developed a habit of meeting for dinner every Monday at his Assagi Restaurant in Hyde Park and thereafter going to The Lounge Strip Club in Vorna Valley near Sandton for entertainment. That was himself, accused, Brett Kebble and other friends.

155.4 On 26 September 2005 which was a Monday he met with accused at his Restaurant as usual for dinner. During the dinner accused started receiving a string of calls on his cellphone. Upon his enquiry as to who was calling him he said it was Brett Kebble. He was taking those calls outside. After an hour he (accused) left, saying he was going to meet with Brett Kebble. He had not yet eaten his dinner according to this witness at that stage.

155.5 After dinner he and his remaining friends went to "*The Lounge*" as usual. About 1½ hours after their arrival there accused joined them. He asked the accused what the problem was he was solving with Brett Kebble and he told him Brett owed him money and he was sorting that aspect out.

155.6 He met Clinton Nassif through the accused some years prior to September 2005. The last time he saw him was during October 2006 just before he (Nassif) was arrested for fraud.

155.7 At some stage after the accused was arrested following on Brett Kebble's death Nassif asked him to phone his (accused's) ex-wife, Viviene, and call her to the parking lot of the shopping centre where his restaurant was. On (Nassif's) request he told Viviene that he (Christopher) wanted to see and talk to her. She came and Nassif talked to her while he stood a few paces away. After that Viviene left.

155.8 He last saw the accused some 8 years back and he never told him about this meeting he had with his ex-wife. Arithmetically this last aspect cannot be correct as he saw him the day before Brett's death, i.e. 26 September 2005.

[156] Cross-examination revealed the following among others:

156.1 This witness did not mention the details he recounted about the restaurant's happening when he made his statement to the police. Neither did he mention in his statement to the police that he introduced accused to Guy Kebble, Brett's brother. On the above and many other aspects that were not recorded in his written statement to the police, this witness kept on answering: "*I was not asked to mention that*."

156.2 He retracted some if not most of what he said in chief, for example:

156.2.1 At this stage he said in fact accused ate half way through his dinner, in contradistinction to what he said in chief that he did not eat his dinner at all.

156.2.2 Nearly all that he said in court did not appear in his statement to the police, e.g. he never mentioned the Welkom story of growing up together, did not mention that he visited the accused in custody, etc.

156.2.3 What is material to the decision in this case is his statement that when he asked the accused why he was in custody, he told him he also did not know.

156.2.4 It emerged that this witness deliberately lied to the accused's ex-wife, Viviene, about himself wanting to talk to her whereas he knew that it was Clinton Nassif who wanted to ask her to tell the accused to co-operate with the Scorpions and dovetail his version with his (Nassif's).

156.2.5 Immediately hereafter the witness contradicted himself materially by denying telling Viviene that he (Christopher) wanted to see her. It also emerged that his restaurant was situated on the ground level of the Hyde Park complex but he asked her to come to the top or 6th level for this meeting.

156.2.6 When cross-examination became too hot for him, this witness resorted to replying with "*I don't know*" even to aspects common enough to be within his personal knowledge. He professed not to know what car Viviene was driving, how long they talked and at what stage she left. He even denied

Clinton Nassif and Viviene having a conversation that night. Ridiculously further, he did not remember if he left them discussing and returned later. When pressed further he conceded going to his restaurant and returning with a cold drink which Viviene was to take to the accused in the cells together with a message. When asked what message, he said he did not know. At some stage he professed never having heard Clinton Nassif tell Viviene to tell the accused to brief Nassif's attorney Tamo Vink. But later he forgot the denial and testified just as much. More information was dragged out of this witness e.g. the fact that Viviene told him to phone accused's attorney about any advice he had for accused, the fact that this witness was not only a facilitator of a meeting but an active participant in a joint venture with Clinton Nassif to convince Viviene to persuade the accused to tell his story to the police the way Nassif did. This witness stated that Hodes SC in this case was representing the accused at that stage but became tongue tied when Hodes SC put it to him that he was not involved at that stage. When he was forced to concede more and more of what actually took place this witness started being

aggressive, recalcitrant and downright angry. He even stated that Brett Kebble was just a youngster in matters such as these and Clinton Nassif was a murderer.

156.2.7 He further stated that it was Roger Kebble who insisted that he (Christopher) come forward and be a witness in the eventual trial of this accused. He is uncertain but he thinks he must have told Roger Kebble about Clinton Nassif's role in Brett Kebble's death.

156.2.8 As the questioning progressed this witness started showing streaks of one time siding with the Kebbles and giving them stories about Nassif and when he was with Nassif he would be on his side and castigate the Kebbles. After categorically denying knowing a man from Dubai called Jay, as questioning persisted he conceded knowing him so intimately that they even intended going into a business joint venture together. All of a sudden, after professing not to remember who was at dinner with him on the night of 26 September 2005; he now remembered that this Jay and one Simphiwe were some of the people there and that

Jay may have disclosed the contents of their dinner table conversation about the prospective Brett Kebble suicide or murder to others.

156.2.9 At the end of this witness's testimony he had not implicated the accused on any wrongdoing relevant to the charges he faces here.

[157] For reasons that will become clear later in this judgment I am dealing with the evidence of Brett Kebble's butler, Andrew Vincent Minaar just before dealing with that of the principal state witness Clinton Nassif. His testimony, just like that of the other witness I have already dealt with, have in it as a golden thread running through it, the hands of the DSO attempting or actually doing things to the statements for the sole purpose of making sure that the accused herein is charged with the crimes he is now facing.

[158] He stated that he was engaged by Brett Kebble as a housekeeper or butler during the year 2002. He knew the accused before this Court as the latter was a regular visitor to the Kebble house. He also knew –

(a) John Stratton, who was a business associate and confidante of Brett Kebble.

(b) Clinton Nassif, who was also a regular visitor to the Brett Kebble household and was also the security consultant who catered for all the private, business and family security needs of the Brett Kebble household.

[159] According to witness Minaar, Brett Kebble stayed at Cape Town and would fly to Johannesburg every Monday or Tuesday and then return to Cape Town on Thursdays. Whenever he flew in he would use Lanseria Airport from whence the family driver, one John or Joseph would collect him.

[160] About a month before his death according to this witness, Brett Kebble drastically changed the above and other well-established routines : He would be alone in the house and the house would mostly be without the usual stream of visitors that all were accustomed to.

[161] On the date of Brett Kebble's death the accused came to the house at about 12h50. Brett Kebble also arrived from Cape Town at about 13h00. They had a short meeting in the patio and then left together. He estimated the length of the meeting to have been about 5 minutes. The accused also came to the Kebble home the morning after the night Brett was shot dead; i.e. on Wednesday 28 September 2005. That was a day before Brett Kebble's father, Roger Kebble also arrived from Cape Town.

[162] According to Mr Minaar Brett Kebble used his Illovo, Johannesburg house as home, office and meeting place for business and leisure. This was despite the fact that he had his companies' offices in Central Johannesburg.

[163] On 22 September 2005 in the evening Clinton Nassif came to the Kebble house where he had dinner with Brett, accused and John Stratton. After the dinner the guests left and Brett went to bed early. This was a Thursday. The following day, i.e. Friday 23 September 2005, at 09h00 accused and Nassif visited the house and had a brief meeting with him next to the entrance hall. He does not mention Stratten being present also. According to this witness, the 23rd was the last day prior to Brett's death that he saw John Stratton at this home.

[164] He stated further that Brett and Stratton had very close relations : they met regularly, dined together and socialised together. Even after Brett's death Stratton was always in and around the house chairing meetings with various people, arranging Brett's burial and generally attending to the office or paperwork there. Their friendship was open for anyone to see. He (Stratton) even over-seered the destruction by fire of some of the documents in Brett's house. He also instructed this witness to burn some of the documents, which he (witness) duly did. According to him further, Stratton took some of the documents to Cape Town with him.

[165] Incidentally, Brett and Stratton had homes in both Johannesburg and Cape Town and they would commute regularly between the two cities, mostly in the company of each other.

[166] Mr Minaar stated that he was not aware of the nature of the friendship or relationship between Brett and the accused and as such took it to be an ordinary relationship between two businessmen.

[167] After Brett's burial the accused would still visit the Kebble house but he did not know what he did or why he was there.

[168] He continued to state that about 2-3 weeks before Brett's death he overheard a discussion between Brett, Stratton and the accused wherein the first mentioned two were demanding that the accused refund a R15 million sum of money given to him to pay to former Police Commissioner Jackie Selebi for certain services the latter was to perform for or on behalf of the Kebbles. He does not know how this discussion ended or whether the money was ever refunded.

[169] Brett Kebble, according to Minaar, never drove himself around. Joseph was his chauffeur. On 26 September 2005 and the date of his death, i.e. 27 September 2005, Brett gave his driver off from duty.

[170] The unusual thing he noticed on the morning of 27 September 2005 when he arrived for duty at 07h00 as usual, was to found two desert bowls and two spoons as if two people had eaten some desert the previous night after he had knocked off and went home. He stayed at Townsview in Johannesburg.

[171] He concluded his evidence-in-chief by stating that he made about 6 (six) statements to several Scorpions' investigators about this issue and that he no longer worked for the Kebbles.

[172] Under cross-examination the following emerged:

172.1 Of the six statements that Minaar allegedly made to the Scorpions only three were given to the defence, according to his answers.

172.2 The first statement was signed on 28 September 2005 before Captain Diederichs of the Scorpions at the Kebble boardroom. This statement described Minaar's residential address, his workplace at the Kebbles and his job description there and does not mention the accused.

172.3 The second statement also deals with issues that do not mention the accused.

172.4 In the third statement that was made or signed by Minaar on 8 October 2007 he for the first time gives elaborate details that involve the accused before this Court. It also implicates former Police Commissioner, Jackie Selebi, former Limpopo Premier Ngwako Ramatlhodi who was at the time a man widely tipped as the successor to the then Director of Public Prosecutions, Bulelani Ngcuka, also then Youth League President and current (at time he testified) Deputy Minister of Police, Fikile Mbalula and other ANC or ruling party politicians with misdeeds or improprieties. Mr Mbalula is presently the Minister of Sport and Culture.

[173] For completeness sake and for purposes of putting Minaar's evidence-in-chief in perspective I find it necessary to summarise the contents of this statement which was extensively referred to during cross-examination. The contents of this statement in my view may have a big impact on whether a section 174 applications should be granted or refused.

173.1 He was hired by Brett Kebble after reacting to a newspaper advert for a butler.

173.2 During the last year and a half preceding Brett Kebble's death Jackie Selebi was visiting Brett's Inanda, Johannesburg house regularly. He was visiting once a month or once in six weeks, every time at night and accompanied by the accused. This

witness never saw Clinton Nassif in the presence of Jackie Selebi and the accused at the Kebble's Inanda home. Selebi would usually visit on Wednesday or Thursday night when Brett Kebble was in Johannesburg from Cape Town. Selebi and Agliotti (accused) would have dinner with Brett and John Stratton.

173.3 According to this statement Brett and Selebi were supporters of Jacob Zuma, then contender for the chairmanship of the ANC and currently President of the RSA. According to Minaar Brett Kebble was assisting Selebi with the Khampepe Commission the principal purpose being to ensure that Selebi ensures that the Scorpion Police Division is disbanded.

173.4 Roger Kebble, Brett's father also had dinners with Selebi when the latter came to visit and he heard him one day say to Selebi:

"*… by all rights I should be in jail …*"

173.5 Minaar did not know if Brett ever paid for holidays for Jackie Selebi but he knew that Brett did pay for Ngwako Ramatlodi's holiday because the latter was tipped as a likely successor to the then National Director of Public Prosecutions, Bulelani Ngcuka.

173.6 About 3 to 4 weeks before Brett's death he was surprised to see Brett pack his collection of 4-5 watches in an Investec box and hand them to Stratton to take to Cape Town for him. According to him this was out of character with the two men's usual habits or practices because the accepted and usual practice was for them to always travel together from Cape Town to Johannesburg, have dinner together at Brett's Inanda home before Joseph (Brett's driver) drove Stratton to his Saxonwold home. Even when they were to return to Cape Town Joseph would collect Stratton from his home, bring him to Brett's Inanda home before driving them to Lanseria Airport where they would fly in Brett's private jet.

173.7 Brett incidentally had another house at Melrose, Johannesburg in addition to another at Illovo.

173.8 On 22 September 2005 which was a Thursday, in the evening Brett had a short dinner with the accused, Stratton and Clinton Nassif but contrary to his accepted or known habit Brett did not fly to Cape Town that evening. He remained at the Inanda house. The following day he held a short meeting with Stratton, the accused and Clinton Nassif. Only then did Brett and Stratton leave for Cape Town thereafter. That meeting lasted for about 10 minutes.

173.9 Brett arrived from Cape Town on Monday 26 September 2005 at 13h00. Stratton was not with him as usual and this was very peculiar and noteworthy to him. He found Clinton Nassif and the accused there. They had arrived just before he did. They had a short meeting and accused and Nassif did not stay for lunch. Brett instead was later joined for dinner by one David Gleeson. They ate prawns. At that dinner he overheard Brett telling Gleeson that he was going to meet one Dominic Ntsele at a Japanese Restaurant at Norwood and then meet with one Sello Rasethaba in connection with his son who was somewhat involved with some drugs issue. He only went home at about 20h00 after Brett and Gleeson had left, he did not know where to.

173.10 On 27 September 2005 i.e. the day Brett was killed, Minaar as usual arrived at the house at 07h00. At about 08h30 Dominic Ntsele arrived but Brett asked him (Minaar) to tell Dominic to come back later and the latter left. At about 11h00 Brett came downstairs and did not have his breakfast, complaining about an indigestion which he ascribed to the prawns he had the previous night. He instead mixed himself 2-gins and tonic, which according to him, was unusual as he never drank alcohol that early.

173.11 There were no other visitors that morning until Gleeson and one Martin arrived for lunch.

173.12 According to him Nassif never turned up at that house that morning. Gleeson and Martin left at 14h00.

173.13 At approximately 15h30 one Sillo Burini came to the house and at 18h30 or 19h00 Dominic also arrived for dinner with Brett Kebble. He prepared them steak and chips which Brett took with wine. He does not remember if Dominic drank any alcohol at that stage.

173.14 Dominic left at 20h30 and Brett also left the house for Sello Rasethaba's house. What surprised him is that Brett was not wearing or carrying his jacket as he usually and reverently did whenever he went for dinner and his shirt sleeves were rolled up, which was taboo for him on such occasions, neither did he carry a box of chocolate or a bottle of wine as a present. He also surprisingly for Minaar, complemented him for the dinner. All the above, according to Minaar, were out of character with Brett Kebble.

173.15 What deepened the mystery according to this witness was that despite Brett Kebble having left home without his jacket, the following morning when he saw the pictures of his car after he died the previous night, his jacket was inside his Mercedes Benz. Worse still, Joseph had cleaned this car before he left and he would have removed the jacket from the car if he found it there.

173.16 The day after Brett Kebble's death, i.e. 28 September 2005 Clinton Nassif offered Minaar a job as a caterer at his business premises. He also informed him that he (Nassif) intends buying a Nandos Fried Chicken franchise as well as build a conference centre next to his existing business. He also employed Brett's maid since Brett's death. When he (Nassif) told him not to tell the police, especially Col Diederichs, anything about Brett Kebble ever meeting with Jackie Selebi, he realised that he was busy trying to buy his silence.

173.17 In his statement Minaar further states that in the week following Brett Kebble's death John Stratton came to the house and removed all items and documents from the safe. He destroyed some documents and took others away with him. He professes not to have any idea about the contents of the documents destroyed or taken away

even though he testified that did some of the burning himself.

173.18 He further stated that he was interviewed by Adv (former Judge) Heath and his son Marius as well as one Klatzow : He was asked about what he knew about Brett Kebble's death. Marius even took him aside and asked him what he thought of Clinton Nassif or his possible involvement in Brett's death. They warned him not to talk to anybody, especially the police without one of them being present.

173.19 About three weeks to a month after Brett Kebble's death a rusty .38 revolver was found in the garden at the Inanda home of Brett Kebble. It was ultimately taken to Roger Kebble's house from whence it was taken by the police.

173.20 According to Minaar again Brett Kebble owned a number of cellphones. He also purchased cellphones for Lunga Mcwana and Fikile Mbalula, then member and President of the ANC Youth League respectively. He mostly bought pay-as-you-go phones and would send Minaar to buy him airtime. He kept some of the cellphones in his house and others in the cubbyhole of his car. He used different cellphones to communicate with different people. He also

utilised his fax fixed line telephone at home to communicate with people as a normal phone.

173.21 He concluded that according to him Nassif and the accused were more of Stratton's cronies than those of Brett. He further stated that he was not surprised by the stories of Brett Kebble having died in an assisted suicide because in the last month before his death his, lifestyle and eating habits had changed dramatically and he seemed troubled and/or depressed.

[174] During cross-examination Minaar conceded that many aspects in his third statement, Exhibit "M:3" were prompted by or he was directed thereto by the Scorpions. These included concentration on Kebble, accused, Stratton and Selebi; Selebi's visits to the Brett Kebble home; Selebi's meetings with Roger Kebble or vice versa; the Ramatlhodi issue; and the trips by private plane to name a few. He agreed that his *viva voce* evidence-in-chief in court went far beyond what is contained in his comprehensive third statement. He also conceded that he did not mention the destruction of documents in his original statements. He however insisted that he mentioned all these and other things to those who were recording his statements and the latter decided in their own judgment to exclude a whole welter of facts and data he gave to them. It was put to him that the police or Scorpion investigators sanitised what he told them to suit their own purposes or intents and he agreed with that.

[175] When it was put to him that contrary to his evidence-in-chief the accused never had dinner with Brett Kebble on 22 September 2005 he insisted that he did so with Clinton Nassif also being present at around 18h30. He agreed that this was also omitted from his statement even though he mentioned it, which was also odd because it appeared therein.

[176] He was confronted with evidence of phone records already tendered on behalf of the state by Vodacom's forensic liaison manager, Johanna Petronella Heynecke which indicated that Clinton Nassif could not have been at the Kebble's Inanda home at the time he mentions on 22 September 2005. He still insisted Nassif was there in spite of this allegedly concrete evidence from one of the state witnesses. This reinforced the defence view that the phone record data could not be relief on in this case.

[177] He had no answer when confronted with the accused's telephone records that proves that he was not in that area from 15h15 that day. He also had no response when it was put to him that none of all these were mentioned in the first two statements of three that the defence were furnished with. He also had no answer when it was put to him that the accused was at or around Morningside at the times relevant to his testimony – a place far removed or away from the Brett Kebble home. After concrete evidence of phone records and beacon positions from whence calls allegedly made by the accused were bounced was placed before him Minaar ultimately conceded that his testimony and the contents of his statements were mostly an echoing of what he was told to sign for by the investigators.

[178] On the events of 26 September 2005 this witness's evidence that Brett Kebble arrived from Cape Town at 13h00 he was thoroughly discredited : He could not dispute the fact that Brett Kebble was with the accused at his Inanda house between 11h15 and 11h40. He professed not to have seen Mickey Schultz and Nigel Mc Gurg in Clinton Nassif's car even when it was shown that it was he who opened the gate for it or when it was parked in front of the open garage where Brett's silver grey Mercedes S600 was parked at the time he (Minaar) stood outside the house facing this car. He also contradicted state evidence led that John Stratton was at Brett's house with Clinton Nassif and Brett on 26 September 2005 during which period Stratton even went outside and waived at Mickey and Mc Gurg as they sat in Nassif's car. He also said Nassif did not come to the Inanda house on 27 September 2005 contrary to common cause evidence that he did.

[179] At the end Minaar conceded that he was urged to mislead the police investigators and he did so. His written statement(s) also contradicted his *viva voce* evidence to the effect that he saw the contents of the documents he was instructed by Stratton to destroy by burning. He even implicated the state counsels in this matter as the people who drummed it into him to come and mention the R15 million allegedly given to Selebi and which evidence would tend to implicate the accused. He mentioned Fikile Mbalula of the ANC Youth League then as well as Stratton as people with whom Brett had some hotlines of communications. He specifically excluded the accused on this aspect. He also included a rider that he was schooled by the investigators about what to come and tell this Court concerning the above issues.

[180] He came up with evidence that in fact Clinton Nassif used to visit Brett Kebble's house in the company of people like Maro Sabatini, Stephen Saunders, André Burger and others, and that Nassif would usually meet with Stratton whenever he came to the house. He stated further that the fact that this piece of evidence did not appear in his statements can also be ascribed to the fact that the police or Scorpions' investigators deliberately sanitised it when they wrote down the statement.

[181] During this hectic and intense cross-examination this witness came up with one piece of evidence that was never mentioned by any witness : That on a certain night during the periods relevant to the charges herein Brett Kebble argued with his father Roger and the two even came to blows – that they actually fought. That their fight was so intense that furniture, pottery, cutlery and crockery were damaged – i.e. broken or shattered. He could not explain why this evidence was neither in his written statements nor mentioned in his testimony in chief before this Court. He said this fight took place in the presence of employees and stakeholders of JCI as they had had a board meeting in the house that day.

[182] I can say here without any fear of contradiction that the prosecution regarded Clinton Nassif as their star witness. This became clear from the expansiveness of their lead on him and the length the defence went into to discredit his evidence during cross-examination. He spent over nine (9) days in the witness stand. On several occasions I was occasioned to adjourn court 30 minutes to an hour earlier upon realising that Mr Nassif was exhausted. It

is never the policy of this Court to allow further cross-examination of any witness when it is clear that that witness's concentration or alertness had been blunted by fatigue.

[183] Nassif was also warned in terms of section 204 of the Criminal Procedure Act before he testified. His testimony was shortly the following:

183.1 He had met the accused at a game of golf towards the end of 2003. Thereafter he met him regularly and their acquaintance grew to such an extend that the accused told him that he was working with a team that included the then National Commissioner of the South African Police, Jackie Selebi, doing this and that for the Kebbles and John Stratton.

183.2 Accused took him to Cape Town to meet John Stratton. Before they went there the accused briefed him on what and how he should speak and say to John Stratton to gain his confidence as the latter was their key to the inner circle at the Kebbles. Among the things Nassif was to tell Stratton was that he (Nassif) was part of Jackie Selebi's team which gathered intelligence and did investigations – things the accused knew would interest Stratton and by extension, the Kebbles.

183.3 According to Nassif the accused later reported back to him that Stratton was happy and impressed with him. The accused, according to Nassif, made it clear to him that any work that he received or did for the Kebbles and Stratton had to go through him.

183.4 The hierarchy and structure at the JCI Group of companies and Randgold which were owned and/or controlled by the Kebbles were explained to him. Although he said he could not fully comprehend or understand it he was ostensibly in awe of the hierarchical structure there. He talked of Brett Kebble as being the boss, at the top. Then there was John Stratton. Then came the accused. Only then, himself and the others received their orders from him.

183.5 The hierarchical structure in the Brett Kebbles empire was akin to that which occurs within Mafia crime syndicates. These syndicates are called "*families*" i.e. Mafia family. The manner in which Nassif talked about the structure in the Kebble family reminded me of the Corleone Family, which was the subject of the crime thriller by the writer Mario Puso titled, "*The Godfather*". I have no doubt that a few or many of us here saw the trilogy of films based on this book which were shown repeatedly on TV a few years ago as a result of public demand. I re-visited this book after listening to evidence herein so as to refresh my

memory on the trickery and shenanigans practiced by the "*Cosa Nostra*" that is the Mafia in Sicilian *parlance*, as demonstrated in that book.

183.6 What was happening within the Corleone Family was not very unlike what was happening within the empire presided over by Brett Kebble. The evidence sketched out by Clinton Nassif about this empire was based on skimming money from the JCI Group of companies, Rand Gold as well as others like Western Areas Mines and then buying patronage with it from high ranking police officials, prospective directors of public prosecutions, politicians at the highest levels and all or any person in a position of authority from whom a favour may be asked or obtained.

183.7 At the head of the Corleone Family was Vito Corleone, a Sicilian immigrant who was smuggled out of Sicily by friends and relatives at a tender age of about 10 (ten) to avoid being killed by a local crime kingpin of his Corleone Village in Sicily. That crime lord was called Don Cicci. Cicci had already ordered the killing of Vito's father Antonio Andolini and his brother Paulo, because they did not want to bow to his rule. Vito's death was ordered because as a boy, he was likely to grow up and when he was older and stronger, he was likely to avenge the deaths of his father and brother.

183.8 He got the surname Corleone by accident : Upon their ship docking in New York in America, all the occupants were lined up and checked for diseases. Vito was found to have tuberculosis and quarantine for three (3) months was ordered. The immigration officer who came to register him did not understand Italian or Sicilian. Vito did not understand or speak English : he had his names pinned on his jacket lapel. The officer read the lapel which read:

"*Vito Andolini from Corleone*"

He accidentally missed or skipped the surname and wrote "*Vito Corleone*". That is how Vito came to be known as Vito Corleone because he could not change to his proper surname without adverse repercussions.

183.9 Fortuitously, as a result of abuse by the authorities and blackmail and exploitation by fellow mainland Italians who disliked Sicilians and feared their criminal overtness and secrecy which Sicilians practised through an oath of silence called "*OMERTA*", he found himself involved in bootlegging and other criminal acts with his peers and they ultimately formed "*a gang*" which evolved into a Mafia Family which they named the Corleone Family.

183.10 The Omerta is a strictly Sicilian oath of secrecy where people intending to form a gang or a "*family*" come together, slashed their thumbs with a knife and then touched each other's bleeding thumbs as a sign of being joined by blood. The nett effect of the "*omerta*" is that a Sicilian does not betray his own "*family*". If arrested for any crime that could betray the existence or identifies of other "*family*" members if he talked, he must keep quiet and keep the silence. This action is called: "*To stand still*". Anybody who "*stands still*" will have his own family members taken care of financially and in any manner required until such member comes back from prison. Such returnees from prison are feted as kings and they acquire cult status as heros within their communities.

183.11 At the head of the Corleone Family was Vito Corleone who was called "*the Don*". He was also affectionately known as "*The Godfather*". He was what was colloquially known in mafia circles as "*Capo duci de capi*" or "*Capo deduci capi*". Alongside the Don but not on equal status with him is what is called the "*Consiglieri*", i.e. the counsellor or advisor. A consigliere must be a wise person who is steeped in the "*omerta*" practice and who could be trusted with the life of his Don.

183.12 Between the Don, who dictated policy and the operatives at ground level, i.e. the ordinary soldiers of the "*Family*" there are three layers of command or buffers. In that way nothing could be traced back to the Don unless the functionary immediately following on the Don's position turns traitor.

183.13 Immediately under the Consiglieri there is what is called "*Capo regimes*" i.e. divisional heads. It can be one or more *capo regimes*, depending on the size and strength or influence of the "*Family*". A *capo regime* controls a specific territory and enforces obedience and discipline within that territory. He defends that territory from being encroached on by rival Mafia families. Many a mafia or gangster wars were sparked by this turf war.

183.14 A *capo regime* is in charge of soldiers who execute his and the Don's orders. In Mafia parlance they are called "*button men*". This terms originated from the fact that once an order is issued to them to "*push the button*" meaning to shoot to kill, they push the button, meaning they shoot to kill without asking why such an order should be executed on pain of them being shot dead on the spot if they dilly-dallied or refused to carry out the order.

183.15 The Don is the overall controller of the entire territory controlled and defended by his *capo regimes*. The preferred speciality of a specific "*Family*" may be drugs or prostitution or labour unions or any lucrative type of human endeavour. Once a "*Family*" chooses a type of business, any other family encroaches onto that business at pains of a war to the death from the incumbent "*Family*".

183.16 A consigliori was the counsellor to the Don, his right hand man, his auxiliary brain. He was also his closest companion and his closest friend. On important trips he would drive the Don's car, at conferences he would go out and get the Don's refreshments – coffee, sandwiches, fresh cigars. He would be the Don's food taster and be expected to know everything the Don knew or nearly everything – all the cells of power. To quote from "*The Godfather*" by *Mario Puso*, 2005 Edition at page 49 –

> "*He was the one man in the world who could bring the Don crashing down to destruction. But no consigliere had ever betrayed a Don, not in the memory of any of the powerful Sicilian families who had established themselves in America. There was no future in it. And every consigliery knew that if he kept the faith, he would become rich, wield power and win respect. If misfortune came, his wife and children would be sheltered and cared for as if he were alive or free. If he kept the faith.*"

> In the Corleone Family Vito Corleone was the Don, Genco Abbandando the consigliory. When he died Tom Hagen succeeded him. The *capo regimes* were Pete Clemenza and Tessio. Under them were the button men or "*soldiers*".

[184] From Clinton Nassif's evidence the comparable or analogous positions in the Kebble empire could have been the following:

(a) Brett Kebble – The Don or Godfather.

(b) John Stratton – Consiglieri.

(c) Accused : Glen Agliotti – Capo regime.

(d) Lower Capo regime – Nassif.

(e) Button men – Schultz, Nigel, Mc Gurg and Faizel "*Kappie*" Smith; and

(f) Soldiers – Nassif's other security employees and whoever would be enlisted or hired to carry out any hit or perform any surveillance or any other chore.

[185] The chain of command in a Mafia family was that –

(a) The Don would privately give the consiglieri instructions as to what should be done. There would be no other witnesses.

(b) In private also, the consiglieri would issue those instructions to a *Capo regime*, they being also only two.

(c) The *Capo regime* would brief a button man who in turn briefs other button men. At times he may brief more than one button man.

(d) The button man or button men would either execute the order or instruction themselves or further instruct soldiers under them or hire professional executioners for the specific chores to be carried out – be they murder, surveillance, breaking peoples legs or intimidating them or tapping telephones, to name a few.

[186] The above buffer system or hierarchy ensures that if things go wrong along the chain downwards, the order cannot be traced back to the Don. In most cases, one or more of the people in the chain of command would disappear without trace to ensure that there are no come-backs or if any one is suspected of being a traitor or sabotaging the process, such a person would be killed execution style in public as a warning to any other would-be traitors or saboteurs within the hierarchy.

[187] Nassif further testified that he was given a list of people that he had to check on and have profiles done on. He was instructed to have surveillance done on other people – in Gauteng, Cape Town, and as far afield as London.

He also testified that on more than one occasion he had to oversee orders to break people's legs or have them killed.

[188] For fifteen months he and the accused saw each other every day. He did not put a month or year to this period for this Court to know if this was closer or further from the period the crimes the acsused is standing arraigned on were committed.

[189] He further testified that during the middle of 2005 at a meeting with Stratton and the accused, they were given names of people that according to Stratton were really causing or becoming problems to Brett Kebble or the Kebbles in general. They were told those people needed to be taken care of.

[190] To "*take care of*" is a Mafia *lingua franca* meaning "*kill*" and he and the accused understood this instruction in that sense. He and the accused agreed that they would not kill anybody or do such a thing. Instead they developed lies, spinning stories to appease Stratton, making him believe that his orders were receiving the necessary attention when they knew that they were not doing anything to execute them.

[191] In one meeting Stephen Mildenhall was discussed. At that meeting according to Nassif's testimony in court, was himself, the accused and Stratton. After that Mildenhall became the subject of several other meetings as he was about to cause some carefully laid plans to secure a substantial loan from a bank to abort.

[192] He testified further that one day during September 2005 the accused phoned him and told him that he must fly to Cape Town as Stratton wanted to see him. As accused did not join him he flew with Sanders to Cape Town to meet Stratton.

[193] In the kitchen at Stratton's home the latter give him Mildenhall's address and pushed a little sushi knife towards him. Thereafter he and Sanders left Stratton's home and drove past the address Stratton gave to him which happens to be Mildenhall's residence. He testified that he just wanted to see the address although he did not intend accepting the job of killing Mildenhall. He and Sanders then drove back to Johannesburg.

[194] In Johannesburg he met with the accused and told him that he (Nassif) was not interested in the job of killing Mildenhall. He stated that after he and the accused had discussed this assignment they decided they did not want to get involved in it at all.

[195] After some time accused called him to a meeting with Stratton and the latter asked them if Mildenhall could not at least this time around be taken out of action for three to six months so as to make sure he did not jeopardise Brett Kebble's carefully arranged loan which was about to be approved but around which Mildenhall was busy snooping and could cause to be aborted or refused.

[196] He promised to look into it. He then contacted Schultz and asked him if he could not execute this latest instruction. Schultz promised to look into it. After a while he (Schultz) came back to him and told him that the job could be done. He notified the accused about this and both of them went to inform Stratton. They told Stratton that the price would be R1 000 000,00 and Stratton agreed. They (accused and Nassif) knew that the cost of executing that job in Cape Town where Mildenhall resided would be far less than R1 million. They intended pocketing the difference. He told Stratton that they needed upfront money to give to the "*button men*" and Stratton arranged through the accused that they get R200 000,00.

[197] According to Nassif, the accused is the one who handed him the R200 000,00 which he in turn handed to Schultz who organised the trip to Cape Town to put Mildenhall out of circulation for the period required.

[198] When I asked him how the R200 000,00 was made up he stated that he did not remember if he initially had a cheque which he cashed or whether he received the amount in cash.

[199] Schultz enlisted the services of Nigel and Kappie. The latter organised some Cape Town thugs through a relative of his. The three hit the road to Cape Town in an X5 BMW which a client had left at their scrap yard for some repairs. Along the way they were involved in an accident and the X5 could not proceed with the trip. He (Nassif) went to Colesberg in the Cape Province where they were stranded and hired them another car. Schultz returned with

him to Johannesburg for a while but drove back to Cape Town again to join his mates.

[200] It was part of their operational ethics that none of them used his official cellphone. They were also not using flights or buses in the travels when on a job – all for the reason that they should not be traced in their movements.

[201] In Cape Town they staked a wrong vehicle, thinking it was Mildenhall's. The reason was that Stratton had given them a wrong address and the car they followed from the wrong address fitted Mildenhall's car. Schultz phoned him (Nassif) and he contacted Stratton who gave them the correct address.

[202] After a day or two Schultz gave him Mildenhall's driver's licence as proof that they did the job they were hired to do. He gave the driver's licence to Strattorn. That same day he met the accused who told him "*these boys were very happy*" meaning Brett Kebble and Stratton.

[203] In relation to the Kebble murder he testified that he attended a meeting with accused and Stratton when the latter asked him whether he could procure a pill that could induce a heart attack without it being detected in a *post mortem* or autopsy. He promised to look for it. In between the accused started pestering him about whether he had not yet procured the pill as Stratton was nagging him over it. He was not told who was to use that pill. He could not find it until Mildenhall was shot.

[204] He then thereafter attended a meeting at Brett's house in Illovo where Stratton and accused were in attendance. He was then told that the sought pill was for Brett to commit suicide with by putting it un-noticed in the drink or food of the pilot flying the aeroplane he would be in. When the pill knocks out the pilot, giving him a massive heart attack then plane would crash and both would die. He was surprised and shocked by this revelation. Later Stratton told Brett that this witness was failing to obtain the heart attack-inducing pill. Brett then personally pleaded with him to try harder to find that pill as he was at the end of his tether with all the trouble brewing at JCI and that if he does not find that pill to end his life, his fear was that he would end up in a mental institution and at worst, in prison from those troubles.

[205] During this discussion, so testified Nassif, accused did not say anything or react in any way. According to him (Nassif) he and the accused could not believe what they were hearing, viz, that Brett indeed wanted to end his own life. He said further that from the accused's reaction to these discussions he formed or gained an impression that the accused was hearing this story of the pill for the first time.

[206] On leaving that meeting he set up an appointment with Brett's father, Roger Kebble. At the resultant meeting with Roger he told him about his son's plans of wanting to die. According to him, Roger freaked out, mouthed expletives and told him that what he had just told him fitted Brett's character because since his youth, whenever he encountered a mental block or serious problems he would contemplate suicide. The following day he was

summoned to Brett's house where he found Brett, Stratton and the accused. Brett Kebble berated him for telling his father about his plans. When he had satisfied himself he (Brett) suggested to him that he should get somebody to do a hijacking on him or anything along those lines. He personally thought Brett had lost his mind! Subsequent to this encounter Brett confronted him about the tablet again at a meeting where he, Kebble, accused, Stratton and one Johann were. When he said, no, Brett and Stratton concentrated on the issue of a faked hijacking to kill him. He promised to think about it. When he met with the accused alone later they discussed this request. They both agreed that they should pretend as if it was never mentioned to them, maybe it would blow away. However, the accused subsequently put pressure on him to do something as he was getting a lot of pressure from Stratton.

[207] As the accused socialised with Stratton and Brett and he did not, he assumed the accused was part of the plotting and planning over this assisted suicide thing.

[208] He told Schultz about the request and the latter considered Brett to be mad to think along those lines. On another later occasion he met Brett and Stratton and they brain-stormed on various methods of executing the plan to have Brett killed. The accused was also present. He then went back to Schultz and told him that if he (Schultz) was not ready or prepared to assist Brett with his death, then the accused would be asked to do so. That was when Schultz agreed to kill Brett. At a further meeting with Brett, accused and Stratton a plan was agreed upon that Schultz would follow Brett along a pre-

agreed road and then shoot him. He told Schultz about this. Then he (Nassif) and accused went back to Brett to relay to him how he would meet his death and it was further agreed that he would be shot dead on 22 September 2005. He and the accused put the price of the hit at R1 million to R2 million. Between him and the accused they agreed that the shooting should not go on until the money had been paid.

[209] The night of 22 September 2005 he realised that he had not told Schultz that the shooting should not go on that night. He asked his wife to phone Schultz and tell him the meeting was off, meaning, no shooting that night.

[210] During the night he received a phone call from an incensed Nigel Mc Gurg who was upset to realise that the accused knew of their plans. He assured him that accused was "*cool*". When Nigel was still not satisfied he told him they would discuss the matter in the morning.

[210] The following morning at CNSG he told Nigel that the accused was a vital cog in the scheme of things as he controlled the finances. Nigel was still not happy : he told him to tell accused never to phone him again, as he (Nigel) and his allies in the soldier's ranks did not want to have anything to do with the accused.

[211] He had another meeting with Kebble, Stratton and the accused at Kebble's home and this time the former sounded very desperate. He even said the hit had to be done on him and if payment was the issue, Stratton would look after the executioners including Nassif. That was when he and the accused took a conscious decision to help him even if it would be for free because they realised that the possibility loomed large that they may not be paid once he is dead. They scheduled the hit with Schultz for 26 September 2005.

[212] The last meeting between Brett, accused and him (Nassif) was then scheduled for the day of the hit, i.e. 26 September 2005.

[213] At around 19h30 to 20h00 on this date he received a call from the accused asking him where the boys were because Brett did not meet them as agreed. He said accused told him Brett was going beserk.

[214] He telephoned the accused and told him that he would investigate and talk to him in the morning.

[215] The next morning Schultz reported to him that their car overheated the previous night and they had to abort the mission. Accused told him how Brett had psyched himself for the death. He (accused) suggested he (Nassif) go see Brett at his home the following day. He did so and explained to him the problems his men encountered. He had gone to this house with Schultz but the latter had remained in the car : He and Kebble prayed together and he

assured Brett that he would be shot that night, i.e. 27 September 2005. Brett even went outside and waved at Schultz.

[216] That night he slept early. At about 21h01 he received a call on his wife's cellphone notifying him that Brett had been shot. He obtained the address of the murder or shooting, collected Sanders and drove to the scene. Accused arrived there 20 minutes after him.

[217] He did not receive any payment for this job and Schultz, Mc Gurg and Smith were breathing down and around his neck demanding their money. He told them accused was going to arrange the payments. Knowing that they would confront the accused about their money he asked accused to lie to them and pretend that indeed he was waiting for the money to pay them. He however feared that the three could hurt the accused if he did not give them their money. He himself did not fear anything from them because he knew how to handle them. He thus started paying them in drips and drabs from his own resources. The last payment he effected after receiving a bond payout of R750 000,00.

[218] About Alexis Dimitri Christopher he said he last saw him four years ago as at the date he testified.

[219] About 20 days after the accused was arrested in connection with this case he asked Alexis Christopher to contact accused's ex-wife as he wanted to talk to her. He was to advise her to go visit the accused in the cells and

urge him to cut a deal with the Scorpions. When Christopher called the accused's ex-wife Viviene, he just told her to meet him (Christopher).

[220] When Viviene arrived he moved with her from near his restaurant which is on the ground floor of the complex to just around the corner on the same level but in the parking lot. He says he told Viviene about the accused cutting a deal with the Scorpions. She promised to relay the message.

[221] He himself was then arrested for fraud. He had lifted his accident damaged Mercedes Benz with a forklift and damaged it beyond repair by dropping it down. He asked his attorney, Tamo Vink to try bail him out by negotiating something with the authorities.

[222] The first statement in connection with our present case he deposed to after his arrest for the fraud case as set out above. He deposed to the 204 statement after being advised by his attorney Tamo Vink to do so. Tamo Vink drafted the statement. He was working with Adv Barry Roux. The second statement was drafted by Andrew Leask and Gerrie Nel and he swore to it while with Vink and Barry Roux. In all he had deposed to five (5) statements.

[223] His relationship with the accused ended when the latter was arrested.

[224] He sent out an emotional apology from the witness stand to the Kebble Family and Mildenhall.

[225] In the Mildenhall shooting he agreed to pay Schultz, Mc Gurg and Smith R500 000,00. He and the accused would then share the balance, taking R250 000,00 each.

[226] He never discussed payments for the Brett Kebble killing with the accused. Apart from receiving R200 000,00 from the accused for the shooting of Mildenhall he never received any other money from him. What he did was ask accused to help retrieve the Brett Kebble payment from Stratton.

[227] He denied ever asking the accused he phone Mc Gurg on 22 September 2005.

[228] If Nassif was not cross-examined there would have been evidence which implicated the accused at least with the conspiracy charges herein. However, he was cross-examined at length and he progressively rendered his evidence-in-chief valueless through the answers he gave.

[229] I do not intend summarising the full extent of the issues raised during the cross-examination of Mr Nassif. I will only refer to some of the issues elicited thereby.

[230] Progressively throughout his cross-examination Nassif retracted most of the evidence he tendered in chief, even on non-contentious issues for example:-

[231] He at first denied sharing attorney Tamo Vink with Sanders but when it was pointed out to him in the record, he grudgingly acknowledged it. He professed having made only two statements to the police, the first one being the section 204 statement deposed to on 8 November 2006. When shown another stated dated 10 November 2005 he then admitted making several other statements.

[232] His statement dated 10 November 2005 was identical to that of Sanders, font, setting, dates, commissioner of oaths, and other aspects and all.

[233] In his earlier statement he was categoric that the meeting with Stratton in Cape Town together with Sanders was demanded and arranged by Stratton himself. In court he says he was told by the accused that Stratton wanted them in Cape Town and he took Sanders along only because the accused was not available for accompany him. That is the meeting where a sushi knife was mentioned.

[234] In his section 204 statement he did not implicate accused of all with the Mildenhall incident but in his evidence in court he does so.

[235] He told court that after leaving Stratton's home he threw the sushi knife out through the window. Sanders said they left it in the hired car.

[236] In court he testified that he himself received a list of people he so killed. Under cross-examination he denied it until the tape was played back to him. On hearing that he lied he said his earlier denial was a mistake on his part.

[237] Immediately thereafter he once more denied putting such a document together or handling it and contended that his testimony to that effect was a mistake.

[238] In chief he denied ever booking into a hotel the day he and Sanders went to see Stratton but his statement clearly mentioned this.

[239] In his statement he was categoric that Stratton alone was the one who put pressure on him to do the job on Mildenhall but in his oral evidence he sought to include the accused as the person who also did so.

[240] He testified in court that the accused gave him the R200 000,00 that Schultz and company took with them to Cape Town for the Mildenhall hit. However when reminded that according to Schultz his (Nassif's) employee received a cheque from him (Nassif) which he cashed at a bank and handed the cash to him (Schultz), he conceded that that was the case.

[241] He did not recall under cross-examination telling Schultz, Mc Gurg and Kappie Smith not to take their cellphones to Cape Town during cross-examination forgetting that he testified that he did so and it was standard

operational requirement during any of their nefarious operations. He answered by saying that he might have possibly reminded them to do so.

[242] During cross-examination he contradicted his oral evidence that the accused did not take part in the set up and the negotiations over the money's to be paid in respect of the Mildenhall job. He had to retract when this was pointed out to him and even shown where in his statement he admitted this.

[243] Initially his version was that Stratton gave him the names of people to be dealt with or eliminated. In his March 2010 statement he said accused gave him those names. Under fire from the cross-examination he stated that his statement was wrong in this regard and that the accused never gave him any list of names.

[244] Under cross-examination he conceded that he never conspired with the accused to plan the murder of Dr Bristow, Nortier or Mark Wellesley-Wood. In respect of Mildenhall Nassif stated that accused never participated in the shooting of Mildenhall. He said he was just present when Stratton gave him (Nassif) instructions to arrange it.

[245] He contradicted himself materially on how much he paid Schultz for the Mildenhall shooting.

[246] He confirmed that the accused never received or shared in any of the various payments for the shootings mentioned in this case, in so doing contradicting his version that accused was at least to receive R250 000,00 for the Mildenhall shooting.

[247] From the totality of his testimony it was clear that Nassif assumed that the accused should have had knowledge of all the planning and organisation of the various operations because he was close to Brett Kebble and Stratton. He could not explain the basis of his assumption.

[248] Clinton Nassif's evidence-in-chief in court differed from the statement he made in terms of section 204 which in turn differed from the supplementary affidavit he made on 30 March 2010. He did not hesitate to contradict himself on an issue he had just admitted. Whenever he was caught out, which was almost 75-80% of the entire cross-examination period he would say "*I have no comme*nt".

[249] He conceded that the chief investigator who took down his last statement(s) is the one who asked him to testify on specific dates which he had not spontaneously spoken about. He conceded that other witnesses' statement's contents were put to him and when he confirmed them the investigator wrote down. As such, his testimony was not an independent recollection of what he personally knew had happened or said.

[250] It was his evidence that he was on call to Stratton and Brett Kebble 24 hours a day, not mentioning the accused hereon. As his testimony progressed he wanted the court to accept that the accused should be interposed into this relationship without providing any foundation for this.

[251] His evidence in relation to when and how or who contacted him telephonically was proven through cross-examination to be untrue. For example, he mentioned in court that he received a call that Brett had been shot at 21h01 whereas phone records pointed to him receiving a first call on that night of 27 September 2005 at 23h01 – two hours later. This mistake was coincidentally made by Sanders in his statement that I earlier stated was identical in form to that of Nassif. An inference, as suggested to him by the cross examiner, that he had first read Sander's statement may be difficult to exclude that he had indeed done so. His responses hereon were inconclusive, to say the least.

[252] Try as he did, Nassif ultimately conceded that when Brett Kebble's shooting plans were finalised accused was not there.

[253] Nassif obviously tried everything in the book to avoid testifying in this trial. There is evidence that just before this trial commenced, he instructed his attorney to approach the accused's attorney with a request that the latter advise his client to negotiate a section 105A plea and sentence agreement with the prosecutors. We know again that before that, at Dimitri Christopher's shopping complex, he tried to convince the accused's ex-wife to go and

persuade the accused as much. It also emerged that his attorney even flew to Australia to ask John Stratton to negotiate the same section 105A plea and sentence agreement. When all these were put to him in cross-examination he professed not to know anything about them at first but had to concede to their truthfulness when questioning intensified.

[254] All the other 12 witnesses who testified against the accused or for the State in this matter did not implicate accused in any wrongdoing or connect him with any of the charges. Even the actual shooters or executioners of instructions to shoot any of the victims in this matter expressly stated that the accused never conspired with any of them to shoot the complainants in count 1, that the accused never participated in the shooting of Mildenhall, he never conspired to kill Brett Kebble with anybody in as far as they knew and he was not present when they shot him.

[255] The allegations of conspiracy and the furtherance of a common purpose in the indictment cannot be sustained when the totality of the evidence is considered *vis-à-vis* the accused.

255.1 The prosecution's heads of argument were not very helpful to this Court. They had no references to parts of the evidence led and the defence was able to point out that most of the assertions attributed to various witnesses in the heads were in fact incorrect.

255.2 The one witness who could have connected the accused to the charges in the indictment herein is Clinton Nassif. Unfortunately, when the totality of his evidence is taken into consideration, he failed dismally to acquit himself of that task.

255.3 I can only speculate on what the situation would have been had the accused been charged together with John Stratton. The latter is, on the evidence herein, a common denominator in everything that happened during all the situations covered by the charges herein. I dare say that it would have been an uphill battle for the accused to convince the court to grant him a discharge at this stage if Stratton was his co-accused. Why accused was not prosecuted simultaneously with Stratton may be one of the biggest injustices that may have come out of this case. However, the State is *dominis litis* and has absolute discretion to decide who to charge and/or with whom.

[256] What now is the legal framework underpinning this application. Section 174 of the Criminal Procedure Act read as follows:

> "***174. Accused may be discharged at the close of case for prosecution.***
>
> *If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict or not guilty*."

[257] The words "*no evidence*" in the section have been interpreted to mean no evidence upon which a reasonable man (court) acting carefully may convict.

S v Khanyapa 1979 (1) SA 824 (A) at 838.

S v Mpetha 1983 (4) SA 262 (C) at 263H.

S v Swartz and Another 2001 (1) SACR 334 (W).

Where an accused is charged with multiple charges the court may discharge him on one or more of those charges if there is no evidence on them.

S v Manekwane 1996 (2) SACR 264 (O).

However, where more than one accused are charged with the same offence the court may refuse to discharge one of them if it is in the interests of justice not to do so.

[258] Where the only evidentiary material on record at the end of the state case is an informal admission made by the accused while pleading not guilty, such does not amount to evidence and the court may, *mero motu* discharge the accused.

S v Mashele 1990 (1) SACR 678 (T).

[259] The above does not apply to our present case because the accused herein has not made any admissions during the plea stage which may or could have materially impacted on culpability.

[260] In arriving at a decision whether an accused person could or may be discharged at the close of the state case it is at present an accepted fact that the credibility of the state witnesses should be taken into account at this stage.

See: *S v Nandha Gopal Naidoo* 1966 (1) PhH 104 (W).

S v Bouwer 1964 (3) SA 800 (O).

S v Mpetha and Others 1983 (4) SA 262 (C) at 265D-G.

[261] However in *S v Mpetha (supra*) Williamson J held among others that credibility would play only a very limited role and the evidence ignored only if it was of such a poor quality that no reasonable person could possibly accept it.

[262] This latter stand corrected earlier practice where the courts were of the view that credibility was not a matter that a judge should consider when considering a discharge as this was a matter to be considered at the appropriate time, i.e. at the end of the trial after the State and defence cases are closed.

See: *R v Dladla & Others (2)* 1961 (3) SA 921 (D).

S v National Board of Executors Ltd & Others 1971 (3) SA 817 (D) at 819.

[263] Even in the pre-constitutional era, presumption of innocence, the right to silence and the right against self-incrimination were recognised. But still there would be conflicting decisions in this regard.

[264] In *S v Kritzinger* 1952 (2) SA 401 (W) the court held among other that the guiding word in section 174 was "*may*" not "*must*". It further enforced the view propounded in the *Dlada* and *National Board of Executors* cases by insisting that even if the evidence at the end of the state case is not such that a reasonable person might convict thereon, the court is still entirely justified to refuse to discharge the accused if it is of the view that there is a possibility that the case for the State may be strengthened by the evidence brought forth in the course of the defences case.

[265] The view in *R v Kritzinger (supra)* was advanced further in *S v Shuping* 1983 (2) SA 119 (B) wherein the following words of Hiemstra CJ at 121A illustrates the point:

> "*At the close of the state case, when discharge is considered, the first question is: (i) is there evidence on which a reasonable man might convict; if not, (ii) is there a reasonable possibility that the defence evidence might supplement the state's case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence*."

[266] As already stated the post constitutional era has changed all these. Even before this era the courts still recognised the constitutional rights of the accused person as I alluded to above. For e.g. in *S v Mall* 1952 (2) SA 401 (W) it was held among others that it is wrong to place the accused on his

defence in such circumstances and expose him or her to the risk of incrimination by a co-accused or by his own admissions.

[267] In *S v Lubaxa* 2001 (4) SA 1251 (SCA) the Supreme Court of Appeal held that where there is a single accused and there is, at the close of the State's case, no possibility of a conviction unless the accused testifies in a self-incriminatory manner, the failure to discharge (if need be, *mero motu* by the court) is a breach of the constitutional guarantee of fairness which will usually lead to the setting aside of the conviction (if it eventually ensued), which would have been based solely on the self-incriminatory evidence.

[268] The same verdict and reasoning as in *S v Lubaxa (supra)* was arrived at in *S v Zuma* 2006 (2) SACR 191 (W) even though it was in respect of a differed aspect.

[269] It is commonly agreed that as at present or always, section 174 serves a valuable purpose and is also constitutionally acceptable as the Criminal Procedure Act's main purpose among others is to strive for or achieve orderly and fair criminal justice.

[270] As aptly set out in Hiemstra's *Criminal Procedure* (Albert Kruger) Lexis Nexis, 2008 at 22-76:

> "*Section 174 creates an exception to the normal trial procedure, primarily to relieve the trial court of the burden of persisting machine like with a futile trial when it is clear that there cannot be a conviction. The underlying purpose is to save time and effort, not to complicate the court's task. The working of the Section is simple and its meaning unambiguous. The court is given the power to render there and then,*

> *at the closure of the case for the prosecution, a judgment of not guilty. There is however a jurisdictional prerequisite to be satisfied before the power arises in this manner: the court must be of the view that there is no evidence upon which a conviction can be based. Therefore, two related but distinguishable decisions have to be made: is there a lack of evidence, and, if so, should discharge be granted? The former entails mainly a clinical assessment of the evidential value of the evidence; the latter requires sound judgement in the light of all the circumstances of the particular case.*"

[271] In terms of section 174 there is no obligation to discharge but a competence to do so. The court is called upon to act judicially with sound judgment in the interest of justice. It may sometimes be unwise for me as judge in this case, to place too much stress or emphasis on what Judge A had occasion to say in case A about the factors and/or measures which had to enjoy priority in that case. The facts and circumstances of each case dictate what route to follow and the judge is led to the end result therein by those circumstances and evidence as coloured and/or informed by recognised rules, laws and procedures.

[272] In *S v Lavhengwa* 1996 (2) SACR 453 (W) the view was expressed that the processes under section 174 translate into a statutorily granted capacity to depart discretionally, in certain specific and limited circumstances, from the usual course; to cut off the tail of a superfluous process. Such a capacity does not detract from either the right to silence or the protection against self-incrimination. If an acquittal flows at the end of the state case the opportunity or need to present evidence by the defence falls away. If discharge is refused, the accused still has the choice whether to testify or not. There is no obligation on him to testify. Once this Court rules that there is no

prima facie case against the accused, there also cannot be any negative consequences as a result of the accused's silence in this context.

See also: *S v Chogagudza* 1996 (3) BCLR 429 (25).

[273] I agree with the view that it is an exercise in futility to lay down rigid rules in advance for an infinite variety of factual situations which may or may not arise. It is thus, in my view, also unwise to attempt to banish issues of credibility in the assessment of issues in terms of section 174 or the confine judicial discretion to "*musts*" or "*must nots*".

[274] Nassif was proven to be an untruthful witness who changed versions without bathing an eyelid. Whenever an inconsistency in his evidence was pointed out, he would concede to it and profess a mistake or say he has no comment.

[275] It is my considered view that Nassif's evidence is of such a poor quality that it cannot be safely relied upon.

[276] It is clear from the evidence led that the DSO wanted the accused so badly that it did not matter how evidence is procured to prosecute him as long as he is brought before court.

[277] It is common cause that an accused person may only be charged with an offence on the basis of a witness's statement only if that statement at the time discloses an offence against him.

[278] In this case, the section 204 statement deposed by Clinton Nassif does not implicate the accused with the offences he was charged with even originally. Why he was arrested and charged at that time is not clear to this Court.

[279] It is so that Nassif's supplementary statement does mention impropriety and/or complicity by the accused in some wrongdoing. The question to be asked is when did Nassif realise that the accused acted as he tried to depict in that statement of 30 March 2010? In any event Nassif was so thoroughly discredited during cross-examination that at the end of the day there is no credible evidence left on record upon which a court, acting carefully, may convict the accused.

[280] As stated hereinbefore, it was held in *S v Lubaxa (supra)* that if there is no possibility of a conviction other than if the accused enters the witness box and incriminate himself, a failure to discharge an accused in those circumstances would be a breach of rights guaranteed in the Constitution. To re-interact the word of Nugent J:

> "*The right to be discharged at that state of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or is concomitant the presumption of innocence), or the right to silence or the right not to testify, but arguably from a*

consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated (Beckenstrater v Rottcher & Theunissen 1955 (1) SA 129 (A) at 135e), and the constitutional protection afforded to dignity and personal freedom (sect. 10 and s. 12) seems to enforce it. It ought to follow that if a prosecution is not to be commenced without the minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s. 10 and s. 12."

[281] Claassen J put it as follows in *S v Mathebula & Another* 1997 (1) SACR 10 (WLD) at 35e:

"*In short, exercising a discretion in favour of the State under the circumstances of this case in terms of Section 174 would, in my view, deny the accused his right to a fair trial. To my mind, the sprit, purport and object of Chap 3 of the Constitution can lead to no other conclusion but that the concept of a fair trial in these circumstances means that one can justly and fairly say to the state:*

> *'You had your chance to prove the accused's guilt. You failed to prove a prima facie case against the accused. You cannot now seek the accused's … assistance, to do what you could not do'.*"

[282] In *S v Ndlangamandla & Another* 1999 (1) SACR 391 (W), Willis J held as follows at 393G-I:

"*It seems to me that the provisions of s. 35(3)(h) of our Constitution with regard to the presumption of innocence, the right to silence and the right not to testify, have at least three practical consequences impacting upon s. 174 of the Criminal Procedure Act:*

1. *The court has a duty mero motu to raise the issue of the possibility of a discharge at the close of the case for the prosecution where it appears to the court that there may be no evidence that the accused committed the offence.*

2. *Credibility, where it is of such poor quality that no reasonable person could possibly accept it, should be taken into account at this stage.*

3. *The second leg of the test in S v Shuping (supra) should not apply.*"

[283] Khumalo J was of the same view in *S v Motlhabane & Others* 1995 (2) SACR 528B when he said the following:

> "*Taking all that has been said above into account I come to the conclusion that the interests of justice would be best served by allowing the application under Section 174 of Act 51 of 1977. This is a serious matter but we must understand that courts decide cases on evidence and if at the end of the State's case the evidence is not sufficient, then the accused is entitled to be discharged.*"

[284] In the circumstances of this case, I am left with very little room to move. I am bound by the evidence that has been led herein. My findings are informed by the circumstances of and evidence led in this case. At the end of the case for the prosecution, the only witness who was expected by the prosecution to implicate the accused with the charges set out in the indictment herein, i.e. Nassif, had dismally failed to do so after his evidence was cancelled or negated during cross-examination, I may be bound to let the accused go. Even under the common law prior, to 27 April 1994, it was accepted practice and principle that in circumstances where the State proves no evidence against the accused, the court should *mero motu*, without waiting

for the accused to make an application for it, discharge him in terms of section 174.

[285] The startling similarities of the statements of Sanders, Nassif and others as well as the attribution of certain phrases to wrong people as well as the utilization of incorrect dates, and times, indicates that there could have been collusion between them in the compilation of those statements. This impacts negatively on their credibility as witnesses and on the fairness of this trial.

[286] The timing of the supplementary affidavit by Nassif and its contents which belatedly tend to implicate the accused herein point to a predetermined or premeditated course of action to implicate this accused in the crimes set out in the indictment. I cannot see any reason why, if the contents of this affidavit were true, they would not have been part of the section 204 statement that Nassif deposed to on 8 November 2006 or the statement he made on 10 November 2005. They sound to me to be recent fabrications and the defence's charge that they were specially invited or put to Nassif by the investigators or the prosecutors at the time for him only to glorify same with his signature may have a ring of some truth to it.

[287] Any attempt to manipulate the evidence of a state witness so as to ensure that he/she testifies in court about matters that are not covered by his/her statement or of which he has no independent knowledge, more so, where

the statement is in terms of section 204 of the Criminal Procedure Act is irregular and may be unconstitutional and render the trial unfair.

[288] The defence caused statements made by the section 204 witnesses as well as statements by other key witnesses to be handed in at this trial in order to illustrate that they testified about aspects that had not been covered in their section 204 statements. This tends, in my view, to show up some semblance of interference with those witnesses before they testified under oath in this Court. It points at or to irregular action on the part of either the investigations or prosecuting team(s) to cajole witnesses into implicating this accused even where such witnesses did not spontaneously implicate him.

[289] In *S v Rozani; Rozani v Director of Public Prosecutions, Wester Cape & Others* 2009 (1) SACR 540 (C), Thring J was dealing with a case where, during a plea of guilty on a charge of rape, the prosecutor deliberately withheld the contents of a J88 Medical Report in respect of what the doctor saw on the complainant when the latter was examined. This the prosecutor did in order that the magistrate should not ask questions from the accused, answers to which might have prompted the court to change the plea of guilty to that of not guilty as the contents thereof were not consistent with those of a person raped. In castigating this behaviour the learned judge said the following among others at 550D:

> "*The fact that, to the knowledge of the prosecutor, the defence attorney was also aware of the content of the J.88 Form greatly mitigates the reprehensibility of the Prosecutor's silence, but it does not, in my judgment, excuse it. In contrast to the position in some countries, in*

> *South Africa it has never been a matter of the Prosecution being expected to win at all costs against the defence … But it is inappropriate and in bad taste to speak of a criminal trial being won or lost by the prosecution. Such an attitude on the part of the prosecutor is unhealthy and dangerous. The state either secures a conviction or it does not do so. It is the overriding duty of the prosecuting authority not to win convictions, but to see to it that justice is done. This may of course include the acquittal of accused persons whose guilt cannot be proved beyond reasonable doubt. A prosecutor is expected at all times to act in a manner which is responsible and fair to the accused and to be candid and open with the court. Hence it is said that it is the duty of a prosecutor to place all the material before the court which is at his disposal, provided that it is relevant and admissible …*"

[290] Even though we are not dealing with proof beyond a reasonable doubt at this stage, the above quotation is still apt and applicable to this case. It was mostly the defence that brought up statements of witnesses that the prosecution did not bring up. Other statements like that of Mr Stemmet were never brought up or officially handed to the defence despite the latter proving that they were relevant to this case. I have noted Adv Dakana's assertion that they themselves as the prosecution were not aware of Stemmet's statement. That, in my view, cannot be a good excuse. Other statements were belatedly handed over to the defence during this trial. Why this one was not handed over or its maker not called is unknown to me and I do not want to speculate thereon.

[291] To sum up, the prosecution also submitted that the accused was shown in evidence to have directly contributed to the shooting of Mildenhall and Brett Kebble. It is my considered view that this submission could only have been tenable if the witness Nassif's evidence-in-chief stood uncontradicted by cross-examination. The State also submitted that the

accused promised to arrange for the payment of the killers. This submission in fact contradicts Nassif's evidence that it is he who came up with this ruse of saying the accused would arrange payments purely to appease Schultz, Mc Gurg and Smith and to protect him (accused) from possible harm from his "*soldier*s" or as said in mafia parlance, "*button men*".

INDEMNITY

[293] I have indicated at the very beginning of this judgment that it may be necessary that I look at the testimonies of Nassif, Schultz, Mc Gurg and Smith with a view to determining whether any of them qualifies to be indemnified from prosecution in respect of any offence related to what he was called upon to testify on.

[294] It is so that the prosecution did not attempt to discredit any of the witnesses it called or draw my attention to the fact that any of them was deviating from his statement. That fact does not preclude me from deciding whether to grant or refuse immunity from prosecution to any of the witnesses. In fact, I am obliged to do so.

[295] During the closing arguments counsel for the defence made known his views as to who should be granted immunity and who not, even though it was not in many words.

295.1 Michael Schultz

He was forthright in his testimony about what he actually did. He received his instruction from Nassif exclusively and he disseminated those to his fellow travellers-in-crime. My considered view is that he testified truthfully about all the unfortunate and blood curdling acts that he committed. If he was not warned in terms of section 204, his conviction for all the crimes in the indictment hereon would have been a formality.

I am satisfied that Schultz testified in a manner that satisfied the requirements of section 204 of the Criminal Procedure Act.

He is thus granted indemnity or immunity from prosecutions in respect of the crimes he testified about and which were set out in the indictment.

295.2 Faizel "*Kappie*" Smith

He also testified in a flowing and convincing manner indicative of a person who was there when the crimes were committed. My view of him is that he was also honest and truthful about his part in these dastardly deeds. He is also granted immunity or indemnity.

295.3 Nigel Mc Gurg

He was a difficult witness who displayed an above average degree of hate for the accused. I could see his face darken with scorn or hate or rage at the mention of the accused's names. He contradicted himself during cross-examination and after careful assessment I have come to the conclusion that those contradictions were not *per se* so as a result of being untruthful. He was so blinded by his hatred of the accused that whenever his name was mentioned he would puff up and start retorting things that contradicted what he said before. I am satisfied what he knew no more than what he was to do with Schultz and Kappie. That regardless, he also corroborated his partners in crime about what they all did. Whether one likes it or not, he also qualifies for indemnity. He is thus also granted immunity or indemnity.

295.4 Clinton Nassif

As set out in this judgment Nassif was evasive, slippery and unconvincing about what he wanted to tell to this Court about what was actually planned and by who. I distinctly formed an impression that he was not telling this Court all the truth. He contradicted himself and also contradicted his bed fellows. I am not satisfied that Nassif qualified for indemnity in terms of

section 204 of the Criminal Procedure Act. He was a woeful witness who acted with emotions when expected to answer simple questions. Why he was never discredited by the prosecution is besides me.

He is thus not granted indemnity from prosecution.

295.5 Stephen Sanders

His statement to the police was made in terms of section 204 but the prosecution did not ask that he be warned in terms of the section. I thus make no finding in respect of him.

[296] Having listened to all the evidence led through the 13 state witnesses herein and having carefully considered the law and all the relevant circumstances and probabilities, it is my considered view and finding that the accused hereon should not remain in the accused dock longer than this moment as the State has not led evidence upon which this Court acting carefully can convict him for all the charges he is facing unless he testifies and incriminate himself.

[297] It is my further finding that the State has not made out a *prima facie* case against the accused at the end of its case.

[298] The manner in which the prosecution was conducted from the time it was handled by the prosecution team that was replaced by the present team violated the accused's right to a fair trial.

[299] Accused is consequently found not guilty and discharged at this stage of the trial in terms of section 174 of the Criminal Procedure Act 51 of 1977.

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F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Counsels for the State:	Dakana, Gcaleka & Mashiane
Counsel for the Accused:	Lawrence Hodes
Date of Judgment:	25th November 2010